

APPENDIX

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1973

**No. 73-5412**

JOHN R. DILLARD and WILLIE WILLIAMS, individually  
and on behalf of all other persons similarly situated,  
*Appellants,*

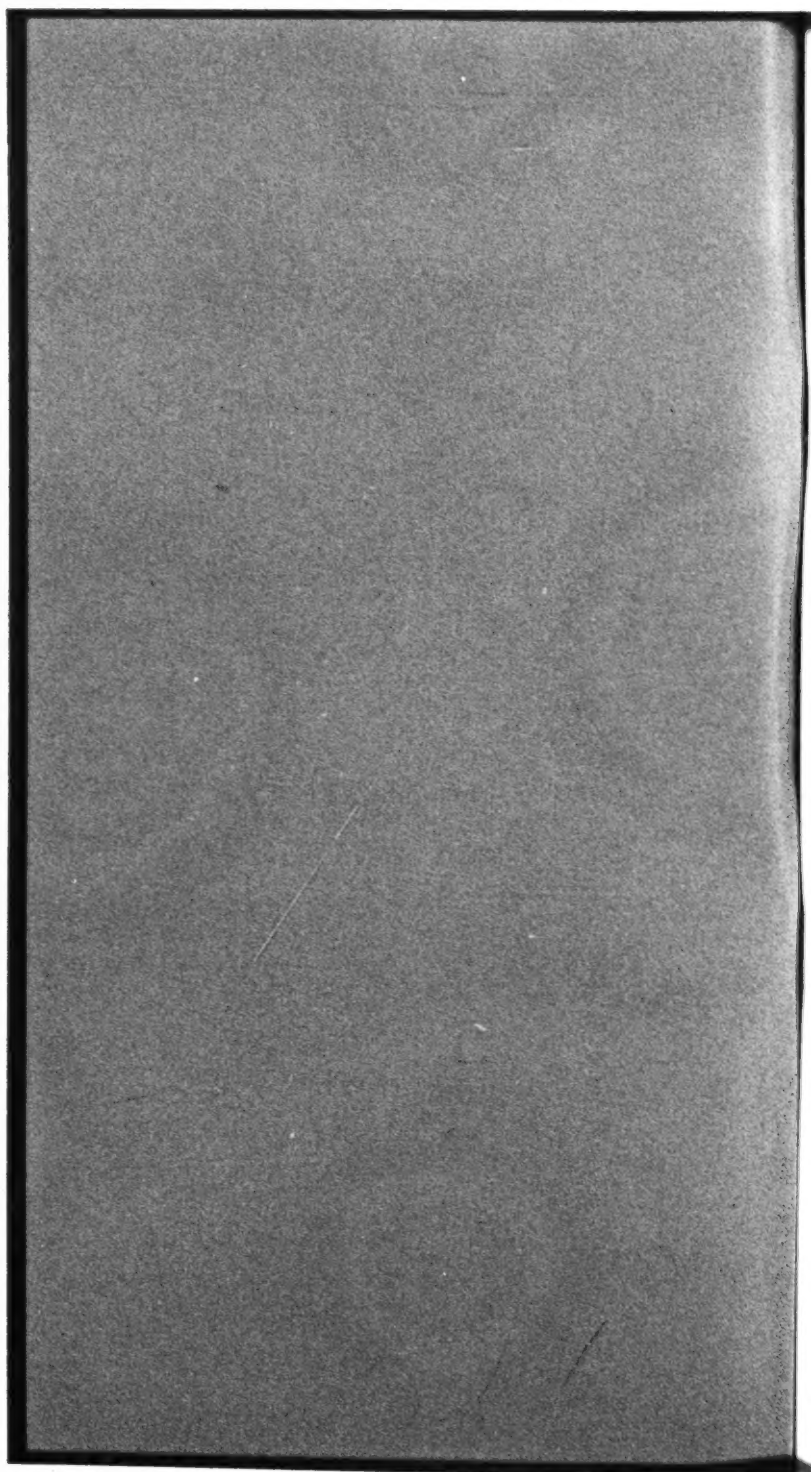
—v.—

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER,  
Chairman, Industrial Commission of Virginia, M. ED-  
WARD EVANS, ROBERT P. JOYNER, Commissioners of  
the Industrial Commission of Virginia, and AETNA  
CASUALTY AND SURETY COMPANY,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

APPEAL DOCKETED SEPTEMBER 10, 1973  
PROBABLE JURISDICTION NOTED DECEMBER 17, 1973





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**Supreme Court of the United States**

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JOHN R. DILLARD and WILLIE WILLIAMS, individually  
and on behalf of all other persons similarly situated,  
*Appellants,*

—v.—

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the Industrial Commission of Virginia, and AETNA  
CASUALTY AND SURETY COMPANY,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

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## DOCKET ENTRIES

DATE	PROCEEDINGS
10/19/71	Complaint filed.
10/19/71	Motion for leave to file in forma pauperis filed by plaintiff.
10/19/71	Affidavit to proceed inform pauperis filed by plaintiff.
10/20/71	Order filing action in forma pauperis, entered 10/20/71.
10/20/71	Copies on pleadings delivered to U. S. Marshal for service on defendants.
10/22/71	IN OPEN COURT-Merhige, Jr.: Parties appeared by counsel. Plaintiff's motion for temporary restraining order argued and denied.
11/10/71	Motion to dismiss filed by defendant, Aetna Casualty & Surety Co.
11/10/71	Motion to dismiss filed by defendants, Industrial Commission of Virginia; Thomas M. Miller, Chairman, M. Edward Evans and Thomas P. Harwood, Jr., Commissioners.
1/25/72	Interrogatories to defendants Industrial Commission of Virginia, Thomas M. Miller, M. Edward Evans and Thomas P. Harwood, Jr., filed by plaintiff.
2/ 4/72	ORDER requesting designation of 3-judge court entered 2/4/72 and filed. Copies mailed counsel and Judge Haynsworth.
2/ 8/72	Designation of three judge court; Albert V. Bryan, U. S. Circuit Judge and Richard B. Kellam, to serve with Robert R. Merhige, Jr. in the hearing of this case, entered 2/7/72. Copies mailed counsel and case files mailed three judges.

## DOCKET ENTRIES

DATE	PROCEEDINGS
2/18/72	PRE-TRIAL ORDER listing cut-off dates; opening brief 4/21/72; reply; 5/5/72; plaintiff reply; 5/15/72; hearing 10:00 a.m., 5/19/72 at Alexandria; file memorandum in 15 days re: motion to dismiss; entered 2/18/72 and filed. Copies mailed counsel and judges.
2/24/72	Answers to interrogatories, filed by defendants.
3/ 1/72	Answer of Aetna Casualty and Surety Company, filed.
3/ 2/72	Motion by defendants Industrial Commission of Virginia, Thomas M. Miller, M. Edward Evans and Thomas P. Harwood, Jr., for order filing answer.
3/ 2/72	Order filing answer of above defendants, entered 3/2/72. Copies mailed counsel and copy mailed Judges Bryan and Kellam, and delivered to Judge Merhige, of motion, order and answer.
3/ 2/72	Answer of defendants Industrial Commission of Virginia, Thomas M. Miller, M. Edward Evans and Thomas P. Harwood, Jr., filed.
3/ 3/72	Memorandum of points and authorities in opposition to defendants motions to dismiss filed by plaintiffs. Copies mailed Judges Bryan and Kellam.
3/21/72	Stipulation of facts received, filed. Copies mailed judges Bryan and Kellam.
4/ 6/72	Defendant's motion for summary judgment received, filed.
4/21/72	Brief of Plaintiff received and filed.
5/ 5/72	Brief of State Defendants filed.
5/ 5/72	Pre-trial brief of defendant, Aetna Casualty and Surety Company, received.

## DOCKET ENTRIES

DATE	PROCEEDINGS
5/15/72	Plaintiff's Reply Brief received, filed.
5/19/72	IN OPEN COURT IN ALEXANDRIA: Bryan, Sr.; Kellam and Merhige, Judges. Appearances by plaintiff and by counsel John M. Levy; Anthony F. Troy, Vann H. Lefcoe and Willard I. Walker, for defendants. This matter came on for hearing for declaratory judgment, temporary restraining order; preliminary and permanent injunction sought. Arguments heard. Matter taken under advisement.
7/17/72	Opinion of three judge court, Judge Merhige dissenting, entered filed.
7/17/72	Order dismissing complaint and action, for reasons stated in opinion, entered 7/17/72. Copies mailed as directed.
8/18/72	Notice of appeal to Supreme Court of United States filed by plaintiff.
8/23/72	ORDER directing Clerk to transmit to the Supreme Court the entire original case record, and requesting that record be returned to Clerk's Office of this Court upon finality of action, entered, filed.
8/23/72	Case record, original, mailed to Clerk, U. S. Supreme Court, by certified mail.
12/12/72	Opinion of Supreme Court of U. S., granting motion to proceed in forma pauperis: vacating judgment and remanding case to USDC to consider whether this case is moot, received, filed.
1/19/73	Motion to intervene as plaintiff filed by Willie Williams. (copies mailed judges) (copies of proposed complaint mailed judges)
2/ 7/73	Plaintiff—Intervenor's Memorandum in Support of Intervention filed. (copies mailed judges)

## DOCKET ENTRIES

DATE	PROCEEDINGS
2/12/73	Plaintiff's Memorandum on Mootness filed.
2/14/73	Statement of defendant Industrial Commission in opposition to petition for intervention, filed.
2/28/73	Supplement to defendants statement in opposition to intervention, filed.
2/28/73	Motion to substitute Robert P. Joyner, as party defendant and dismiss Thomas P. Harwood as party defendant filed by defendant HARWOOD.
3/ 6/73	Defendants' Memorandum on Mootness filed, Copies mailed Judges.
3/14/73	ORDER dismissing T. P. Harwood, Jr., as party defendant and substituting Robert P. Joyner, as party defendant entered 3/14/73 and filed. Copies mailed counsel.
6/11/73	IN OPEN COURT: Bryan, Sr.; Merhige, Kellam, Judges. Smonskey, OCR. Parties with counsel. This matter came on for hearing in Alexandria for hearing on motion of Willie Williams to intervene and the question of possible mootness.  Argument heard. Matter taken under advisement.
6/26/73	Per Curiam Opinion of panel filed.
6/26/73	ORDER allowing Willie Williams to intervene as party plaintiff; proposed complaint filed; answer of defendant Industrial Commission filed to original complaint be and is considered as answer to intervenor's complaint; action declared class action and named plaintiff is representative of affected class; cause is not moot and Court's copinion is reinstated, effective this date entered 6/26/73 and filed. Copies to Judges and counsel.

## DOCKET ENTRIES

DATE	PROCEEDINGS
6/26/73	Intervenor—Plaintiff, Willie Williams, complaint filed.
7/26/73	Plaintiff's notice of appeal to Supreme Court of the United States filed.
7/26/73	ORDER directing Clerk to transmit original record, same to be returned upon finality of action, entered, filed.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division

Civil Action No. 537-71-R 4

JOHN R. DILLARD, individually, and on behalf of all  
other persons similarly situated, COMPLAINANT

v.

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER,  
Chairman, Industrial Commission of Virginia, M. ED-  
WARD EVANS, THOMAS P. HARWOOD, JR., Commissioners  
of the Industrial Commission of Virginia, and AETNA  
CASUALTY AND SURETY COMPANY, DEFENDANTS

COMPLAINT

1. This is an action for a temporary restraining order, a preliminary and permanent injunction, and damages authorized by 42 U.S.C. § 1983 to redress the deprivation, under color of state law, statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured by the Constitution of the United States. The rights, privileges and immunities for which redress is sought are those secured by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. This is also an action for a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202, to declare the rights established by the aforementioned constitutional provision.

2. Jurisdiction is conferred on this Court by 28 U.S.C. § 1343(3) and (4), providing for original jurisdiction of this Court in suits authorized by 42 U.S.C. § 1983; jurisdiction is further conferred on this Court by 28 U.S.C. §§ 2201 and 2202 relating to declaratory judgments, and by 28 U.S.C. §§ 2281 and 2284 providing for a three-judge district court.

3. Plaintiff respectfully requests that a three-judge dis-



trict court be convened pursuant to 28 U.S.C. § 2281, for the reason that he seeks an injunction to restrain the defendants, officers of the State of Virginia and their agents, from the enforcement, operation and execution of a statewide regulation by reason of its repugnance to the Constitution of the United States.

4. Plaintiff John R. Dillard is a citizen of the United States and a resident of the State of Virginia. Plaintiff's sole income had been forty dollars and eighty cents (\$40.80) per week paid by defendant, Aetna Casualty and Surety Company, pursuant to an award of Workmen's Compensation by the defendant, Industrial Commission of Virginia.

5. Plaintiff brings this action on his own behalf and on behalf of all other persons similarly situated pursuant to Rule 23 (a), (b) (2) of the Federal Rules of Civil Procedure. The class which plaintiff represents is all persons similarly situated who are recipients of Workmen's Compensation pursuant to the Virginia Workmen's Compensation Act (Title 65, Code of Virginia, as amended) and who are, therefore, subject to having their benefits terminated prior to a hearing before the Industrial Commission of Virginia. The members of the class on behalf of whom plaintiff sues are so numerous as to make joinder impracticable. There are questions of law or fact common to all members of the class, since plaintiff challenges the validity of a rule or regulation which is alleged to be applied uniformly to all members of the class on grounds available to all members of the class; to wit, the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The claims of the plaintiff are typical of the claims of the members of the class. The plaintiff will fairly and adequately protect the interest of the members of the class.

6. Defendant Thomas M. Miller is the chairman of the Industrial Commission of Virginia. Defendants M. Edward Evans, and Thomas P. Harwood, Jr., are the other members of said Commission. The Defendant, Industrial Commission of Virginia, is empowered, under Section 65.1-18 of the Code of Virginia, as amended, to make

rules for carrying out the purposes of the Virginia Workmen's Compensation Act, including the Rule herein complained of.

7. Defendant, Aetna Casualty and Surety Company, is a Connecticut corporation whose registered agent is Richard L. Williams, 1400 Ross Building, Richmond, Virginia 23219, and which under the Act (Section 65.1-111 and 65.1-113) was the insurance company obligated to pay workmen's compensation to the plaintiff, John R. Dillard.

8. The defendant, Aetna Casualty and Surety Company, paid the plaintiff, John R. Dillard, pursuant to the provisions of the Act until such defendant made an Application For Hearing under Rule 13 of the Rules of the Industrial Commission of Virginia and discontinued paying workmen's compensation to the plaintiff.

9. Plaintiff, John R. Dillard, on March 15, 1971, had an accident arising out of and in the course of his employment. The defendant, Industrial Commission of Virginia approved, on April 7, 1971, a memorandum of agreement entered into on March 30, 1971, "for the payment of compensation under the Workmen's Compensation Act" and awarded compensation of forty dollars and eighty cents (\$40.80) per week, during incapacity, beginning March 23, 1971. (Copy of which is attached as Exhibit I.)

10. On June 3, 1971, the defendant Aetna Casualty and Surety Company, filed an Application for Hearing, pursuant to Rule 13 of the Rules of the Industrial Commission of Virginia and, pursuant to the said Rule discontinued plaintiff, John R. Dillard's compensation. (Copy attached as Exhibit II.)

11. On July 16, 1971, a hearing was held on defendant, Aetna Casualty and Surety Company's application.

12. On August 25, 1971, defendant Commissioner M. Edward Evans wrote an opinion finding plaintiff, John R. Dillard, still unable to return to work, and awarded him all accrued compensation back to June 3, 1971, and directed that compensation be resumed under the outstanding award. (Copy attached as Exhibit III.)

13. On September 16, 1971, the defendant Aetna Casualty and Surety Company, made another Application for Hearing pursuant to Rule 13 of the Rules of the Industrial Commission of Virginia, and discontinued plaintiff John R. Dillard's Workmen's Compensation. (Copy attached as Exhibit IV.)

14. Plaintiff John R. Dillard's sole source of income for himself and his wife has been, since his accident on March 15, 1971, the workmen's compensation. The discontinuance of the compensation has caused the Plaintiff John R. Dillard and his wife extreme and irreparable hardship and suffering, in that plaintiff has been unable to purchase the minimum necessities of life.

15. Rule 13 of the Rules of the Industrial Commission of Virginia violates plaintiff's, and the class he represents, rights to Due Process guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that said Rule allows workmen's compensation to be discontinued on the grounds of a change of condition prior to the holding of an evidentiary hearing as required by the guarantees of Procedural due process of the Constitution of the United States.

WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated, respectfully prays that this Court:

1. Issue a temporary restraining order directing the defendants to resume paying the plaintiff compensation under his outstanding award.

2. Assume jurisdiction of this cause, convene a three-judge district court to determine this controversy pursuant to 28 U.S.C. §§ 2281 and 2284 and set this cause down for hearing.

3. Enter a declaratory judgment pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure, declaring that Rule 13 of the Rules of the Industrial Commission of Virginia violates and is repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

4. Enter a preliminary injunction pending the final determination of this matter, and thereafter, a permanent injunction prohibiting, restraining and enjoining defendants, their successors in office, agents and employees from enforcing, applying or implementing the aforesaid Rule.

5. Grant plaintiff his costs herein and any additional or alternative relief as the court may deem to be just and appropriate.

Respectfully submitted,

/s/ John R. Dillard  
JOHN R. DILLARD

THE LEGAL AID SOCIETY  
OF ROANOKE VALLEY  
702 Shenandoah Avenue, N.W.  
Roanoke, Virginia 24016

/s/ Kurt Berggren  
KURT BERGGREN

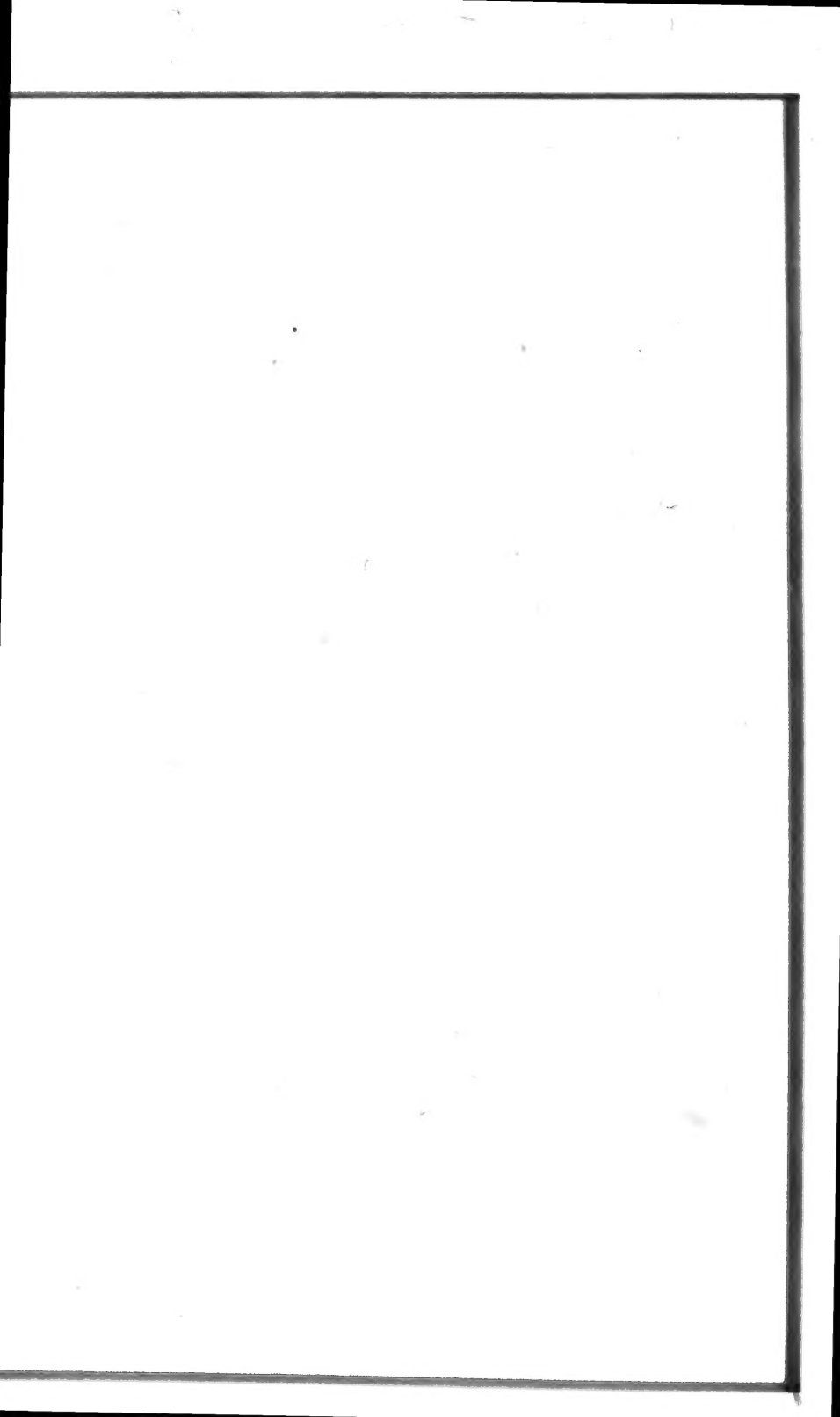
/s/ John M. Levy  
JOHN M. LEVY  
Attorneys for Plaintiffs

# VERIFICATION

JOHN R. DILLARD, being duly sworn, deposes and says that he is the named plaintiff in the above and foregoing Complaint and that the facts alleged therein are true to the best of his knowledge and belief.

/s/ John R. Dillard  
JOHN R. DILLARD

[Jurat Omitted in Printing]



COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF WORKMEN'S COMPENSATION  
**INDUSTRIAL COMMISSION OF VIRGINIA**

DIVISION OF CLAIMS

P. O. BOX 1794  
RICHMOND, VIRGINIA 23214

Claim No. 169-370 (R58 CC 163256 MR)

Case of John R Dillard  
Accident: 3-13-71

AWARD

Approval of Agreement  
fgDate April 7, 1971

To Peaslee Mills Incorporated, (Employer)  
303 - 6th Street  
Roanoke, Virginia

and Mr. John R Dillard, (Employee)  
Box 523, Route 11  
Roanoke, Virginia

and Aetna Casualty & Surety Company  
P O Box 781  
Roanoke, Virginia 24004

(Insurance Carrier)

Note: The compensation herein awarded is to be paid by the insurance company or by the employer, if self-insurer. In the event that payment is delayed, the employee is requested to write the insurance company or his employer, or, before taking it up with the Commission.

Take notice that the Industrial Commission of Virginia has approved the memorandum of agreement entered into March 30, 1971 for the payment of compensation under the Workmen's

Compensation Act, and in accordance with the provisions of said Act enters an award of compensation as follows:

\$40.80 per week, during incapacity, payable weekly, beginning March 23, 1971.

Medical benefits are awarded for the full statutory period.

INDUSTRIAL COMMISSION OF VIRGINIA

If incapacity (disability) as indicated in Section 65-152 exceeds six (6) weeks, compensation shall then be paid for such period for days of incapacity to work, in accordance with Section 65-154, and Section 65-156, in addition to such payments as may be awarded under Section 65-155 and the Commission be advised.

EXHIBIT I

**INDUSTRIAL COMMISSION OF VIRGINIA**  
P. O. Box 1794  
Richmond, Virginia 23214

**APPLICATION FOR HEARING**

File No. 169-570Employee John R. DillardEmployer Roanoke Mills, Inc.Date of Accident 3/15, 19 71Average Weekly Wage \$ 68.00Place Where Accident Occurred Salem

(City or County)

By Virginia

(State)

Nature of Injury or Occupational Disease: Right Inguinal HerniaDate Disability Began: 3/16, 19 71Date of Return to Work: Able to R/W 6/1 19 71, and wage then earned \$ 68.00  
As per medical report from Dr. W. L. Sibley, Sr. dated 6/19/71.

The applicant requests a hearing before the Industrial Commission of Virginia on the grounds of:

- (1) Accidental Injury..... ( )
- (2) Occupational Disease..... ( )
- (3) Death on \_\_\_\_\_, 19\_\_\_\_, due to Accidental Injury..... ( )
- (4) Change in Condition..... Occupational Disease..... ( )
- (x)

If application is based on a change in condition, state nature of change: \_\_\_\_\_

Claimant able to return to work as per medical report from Dr. W. L. Sibley, Sr.  
dated 5/19/71. Has not signed Agreed Statement of Fact.

Compensation was last paid at the rate of \$ 40.80 per week through the \_\_\_\_\_ 2nd \_\_\_\_\_ day of  
June, 19 71.

Signature of Applicant: Alice O. Hurd

AETNA CASUALTY &amp; SURETY CO.

Address: P. O. Box 781ROANOKE, VA. 24004

Signed this \_\_\_\_\_ 1st \_\_\_\_\_ day of \_\_\_\_\_ June \_\_\_\_\_, 19 71.

Subpoenas for witnesses will be issued by the Industrial Commission on request or may be obtained at the Clerk's Office of the City or County where the hearing will be held (§65.1-21, Code of Va.). Medical reports are acceptable in lieu of physicians' personal appearances.

cc: Roanoke Mills, Inc.  
John R. Dillard

EXHIBIT II





EXHIBIT III  
VIRGINIA  
IN THE INDUSTRIAL COMMISSION

JOHN R. DILLARD, CLAIMANT

v.

ROANOKE MILLS, INCORPORATED, EMPLOYER  
AETNA CASUALTY & SURETY COMPANY, INSURER

Claim No. 169-570

[Aug. 25, 1971]

Claimant appeared in person.  
John M. Levy, Attorney at Law, The  
Legal Aid Society of Roanoke Valley,  
P. O. Box 479, Roanoke, Virginia  
24003, for the Claimant.

Kime, Jolly & Clemens (G. O. Clemens)  
Attorneys at Law, 430 Clay Street,  
East, Salem, Virginia 24153, for the  
Defendants.

Hearing before EVANS, Commissioner, at Roanoke,  
Virginia, on July 16, 1971.

Opinion by EVANS, Commissioner.

John R. Dillard sustained a right inguinal hernia as a result of an accident arising out of and during the course of his employment with Roanoke Mills, Incorporated, on March 15, 1971. The hernia was surgically repaired and compensation paid under an award of the Commission through June 2, 1971. At that time the employer applied for a hearing wherein it seeks to terminate payment under the award on the grounds that the em-

ployee had been discharged by the attending physician as able to return to work.

In support of its application the employer submitted into the evidence a report of Dr. W. L. Sibley, Sr., Roanoke, Virginia, dated May 19, 1971. The report is as follows:

"Mr. Dillard was operated on by me about two months ago for repair of a right inguinal hernia. Almost ever since the operation he has complained of pain and swelling in the area of the operation but, as far as I can tell from looking at him and examining him, I find nothing abnormal with the operative area.

"He contends that his pain is so severe that he can't work and requires prescriptions to relieve the pain. I can't say that he doesn't have pain, but I do not know why he has it.

"He has requested two more weeks in order to see if the pain will disappear, which he says he has. I have granted him this much time off. I will see him again in about two weeks. As far as I can tell from physical examination, he appeared to be recovered."

The employee was again examined by Dr. Sibley on June 2, 1971. At that time the examination disclosed slight swelling at the site of the operation but this was deemed to be usual following surgery. However, claimant was complaining of severe pain. Dr. Sibley did not express an opinion as to whether or not the employee should return to work.

Claimant placed himself under the care of Dr. C. F. Matthews, Martinsville, Virginia. Under date of July 14, 1971, this physician reported that he had been treating the employee for pain in the right groin; that the right groin was indurated and swollen and that the patient was still disabled for work.

The parties at issue requested permission to have the employee examined by a physician mutually chosen by

them for the purpose of obtaining his opinion as to the employee's continuing disability. This examination was made on August 12, 1971, by Dr. Robert L. A. Keeley, Roanoke, Virginia. Pertinent portions of the report are as follows:

"Examination reveals a transverse incision in the right inguinal region, with tenderness in the fascia beneath the incision. The femoral artery pulse is excellent. There is no evidence of a recurrence, either lying down or standing up or when the patient coughs or strains or is relaxed. The fascia overlying the cord is exquisitely tender according to the patient. There is no appreciable edema in the scrotum or in the right testicle. Patient states that when he sits down this discomfort is relieved. I find no evidence of anything other than an over sensitive thickened fascia beneath the subcutaneous tissue where the hernia repair was performed. Ordinarily, most patients who have had a hernia repair are quite comfortable and ready to go back to work after 8 weeks, and in this respect this patient is unusual. In my past experience, I have had an occasional patient who complained of tenderness in the wound for an extended period of time, which finally subsided. I believe the choices open to us in this patient are: 1) to allow an additional month for tenderness to subside, 2) offer him reoperation with excision of the right testicle and cord, or 3) Number 1 followed by number 2.

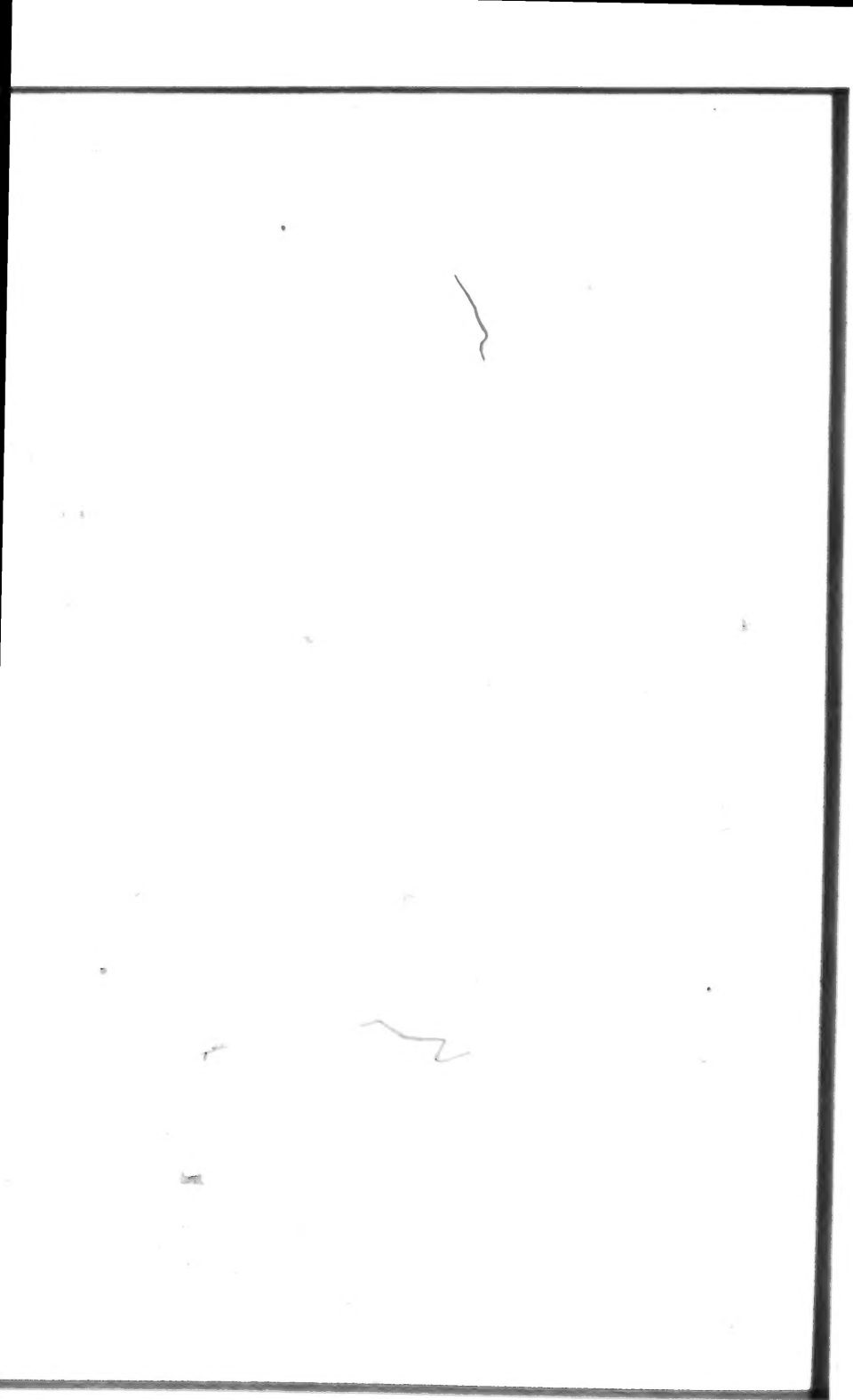
"The patient gives the appearance of being properly motivated and most males who are willing to give up a cord and testicle in order to get more comfortable and get back to work would seem to be properly motivated."

The evidence fails to preponderate in proving that this employee had sufficiently recovered from the effects of his industrial injury to enable him to return to work as alleged in the application. Accordingly, the relief sought must be denied.

### AWARD

Compensation payments shall be resumed under the outstanding award as of June 3, 1971, and continue thereunder until such time as subsequent conditions justify a modification.

All accrued compensation shall be paid upon receipt of this award and future payments made each week thereafter as they accrue.



# INDUSTRIAL COMMISSION OF VIRGINIA

P. O. Box 1794

Richmond, Virginia 23214

## APPLICATION FOR HEARING

File No. 169-570

Employee JOHN R. DILLARD

Employer ROANOKE MILLS, INC.

Date of Accident 3/15, 19 71 Average Weekly Wage \$8.00

Place Where Accident Occurred Salem Va. (City or County) (State)

Nature of Injury or Occupational Disease: Right inguinal hernia

Date Disability Began: 3/16, 19 71

Date of Return to Work: -, 19 -, and wage then earned \$ -

The applicant requests a hearing before the Industrial Commission of Virginia on the grounds of:

- (1) Accidental Injury..... ( )
- (2) Occupational Disease..... ( )
- (3) Death on -, 19 -, due to Accidental Injury..... ( )
- (4) Change in Condition..... ( )
- (5) Occupational Disease..... ( )
- (6) Change in Condition..... (x)

If application is based on a change in condition, state nature of change: -

Refusal of medical treatment as outlined by Dr. Keeley and in accordance with -  
your award dated 4/25/71.

Compensation was last paid at the rate of \$ 40.80 per week through the 17th day of Sept., 19 71

Signature of Applicant: John R. Dillard

Address: ETNA CASUALTY & SURETY CO.  
P. O. Box 781

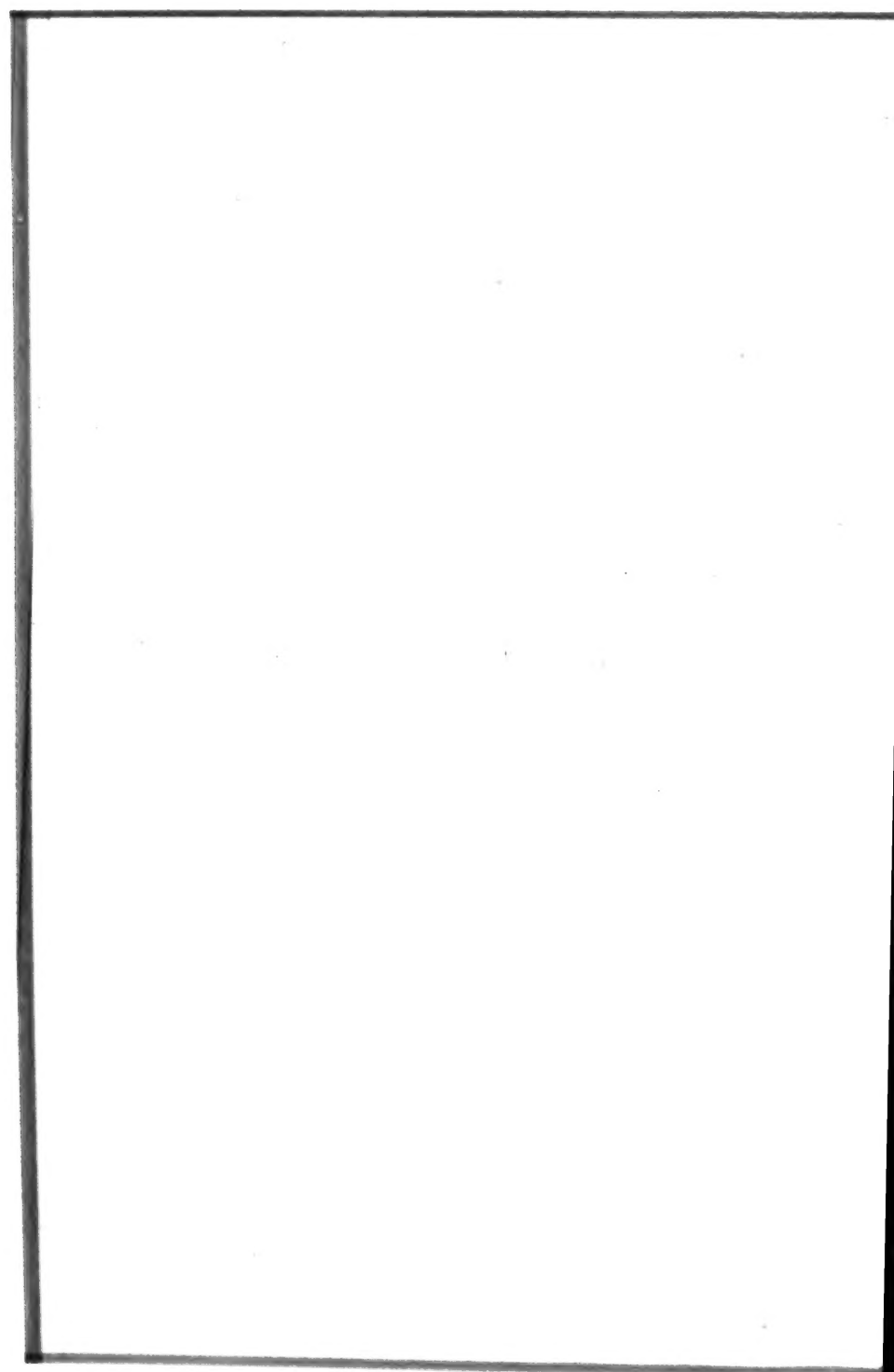
ROANOKE, VA. 24004

Signed this 16th day of Sept., 19 71

Subpoenas for witnesses will be issued by the Industrial Commission on request or may be obtained at the Clerk's Office of the City or County where the hearing will be held (§65.1-21, Code of Va.). Medical reports are acceptable in lieu of physicians' personal appearances.

cc: Roanoke Mills, Inc.  
John R. Dillard

EXHIBIT IV



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

[Title Omitted in Printing]

MOTION TO DISMISS

Comes now the defendant, Aetna Casualty and Surety Company, and pursuant to the Federal Rules of Civil Procedure moves this Court to dismiss the complaint on the following grounds:

I. There is no case or controversy now existing between Aetna and plaintiff as required by Article III, Section 2 of the Constitution of the United States. Actions taken by Aetna in admitting the liability renders plaintiff's claim moot (Exhibits A & B).

II. Plaintiff alleges rights which can be secured by existing state laws and procedures. Plaintiff seeks not political or civil rights, whose loss can never be remedied but rather the alteration of procedures dealing with monetary awards; later judgment would make plaintiff whole.

Further, plaintiff seems to base his case on the conclusion that termination of payment is required by Rule 13. The statute and regulations do not by their terms so require. Thus plaintiff's alleged deprivation at best derives from a statutory ambiguity, a matter which should first be heard in the state courts.

Accordingly, since this does not involve political rights and plaintiff has not exhausted or tested state remedies, this Court should abstain until such good faith attempt is made.

III. This Court lacks jurisdiction over the complaint by reason of the following:

A. This action is not authorized of 42 USC § 1983 as the actions complained of do not deprive plaintiff of constitutional rights, privileges or immunities.

B. 28 USC § 2281 confers no jurisdiction over private parties.



C. Since the gravamen of complaint is a postponement of a monetary award of less than \$10,000, the amount pleaded is insufficient to confer jurisdiction upon this Court.

IV. Claimant has failed to state a cause of action upon which relief can be granted.

A. Rule 13 does not condone the termination herein complained of; rather, it provides a means by which the carrier can obtain a hearing but, as a precondition, requires the carrier to pay the award to the date of application. Any subsequent termination is purely the election of the carrier and thus is a private matter between carrier, employee and employer. Virginia neither requires nor sanctions the termination; thus there is no deprivation under color of state law.

B. Plaintiff may elect to retain his common law rights against his employer and avoid any participation in the contractual scheme. His voluntary election therefore precludes an action for recovery based on 42 USC §1983.

C. Involved here are contractual rights between private parties, the application of which is not a matter for adjudication by federal courts under § 1983. Since there are no "public" or "constitutional" rights, privileges or immunities herein involved, 42 USC § 1983 does not create a cause of action.

V. By failing to join all other insurance companies in this state which write "Workmen's Compensation" insurance and all self-insured employers subject to the provisions of the Virginia Workmen's Compensation Act, plaintiff has not met the requirement of Rule 19, Federal Rules of Civil Procedure.

VI. Plaintiff does not adequately represent the class that he seeks to protect, nor can he fairly and adequately protect the interest of the members of the class whose

major protection is Rule 13. Accordingly, his claim of a class action does not meet the requirements of Rule 23.

Respectfully submitted,  
AETNA CASUALTY AND  
SURETY COMPANY

By /s/ [Illegible]  
Of Counsel

Willard I. Walker  
McGuire, Woods & Battle  
1400 Ross Building  
Richmond, Virginia 23219

[Certificate of Service Omitted in Printing]

## EXHIBIT A

VIRGINIA:

IN THE INDUSTRIAL COMMISSION OF VIRGINIA

JOHN R. DILLARD, CLAIMANT

v.

ROANOKE MILLS, INC., EMPLOYER

and

AETNA CASUALTY AND SURETY COMPANY, INSURER

PETITION FOR APPROVAL OF COMPROMISE SETTLEMENT

TO THE HONORABLE COMMISSIONERS OF THE  
INDUSTRIAL COMMISSION OF VIRGINIA

Your petitioners, John R. Dillard, by counsel, Roanoke Mills, Inc., Employer and Aetna Casualty and Surety Company, Insurer, pursuant to Sections 65.1-45 and 65.1-93 of the Code of Virginia, 1950 as amended, respectfully request approval by the Industrial Commission of Virginia of a compromise settlement as hereinafter set forth and represents unto the Industrial Commission as follows:

1. John R. Dillard sustained an injury by accident arising out of an in the course of his employment with Roanoke Mills, Inc. on March 15, 1971, which resulted in temporary-total disability of the claimant as is set forth in the various medical reports filed with the Industrial Commission and findings of the Commission at hearings prior to this date.

2. Despite medical reports indicating an ability of the claimant to return to work on several occasions, the claimant has not returned to Roanoke Mills, Inc. since the date of the accident.

3. Medical reports are now on file with the Industrial Commission which indicate that there is no organic problem or psychiatric problem with Mr. Dillard and he can, in fact, return to work. Also recent medical reports are on file with the Industrial Commission which indicate that there is an organic problem with Mr. Dillard and he can not, in fact, return to work.

4. The employee, John R. Dillard, maintains that he is still unable to work as a result of injuries received in the accident of March 15, 1971. The employer and insurer believe that he is able to return to work as of this date.

5. Up through July 21, 1972, the claimant has received in weekly benefits the sum of TWO THOUSAND FOUR HUNDRED EIGHTEEN AND 86/100 DOLLARS (\$2,418.86) and in medical payments the amount of NINE HUNDRED TWENTY THREE AND 64/100 DOLLARS (\$923.64).

6. Notwithstanding the foregoing disagreements, your petitioners have now reached a compromise agreement with full knowledge and understanding of the herein-stated facts and the general medical situation of the claimant by the terms of which compromise agreement the insurer would pay to the claimant, John R. Dillard, the additional sum of FOUR THOUSAND TWO HUNDRED FORTY-THREE AND 20/100 (\$4,243.20) representing 102 weeks of benefits, payable as a lump sum, the employer and insurer to be released and forever discharged from any and all liability for any further compensation or medical expenses that are now due or may hereafter become due as a result of any claim arising from the accident and the injury to the claimant which occurred on March 15, 1971.

Respectfully submitted,

---

JOHN R. DILLARD

ROANOKE MILLS, INC.

and

AETNA CASUALTY AND SURETY COMPANY

By \_\_\_\_\_

Of Counsel

MCGUIRE, WOODS & BATTLE

1400 Ross Building

Richmond, Virginia 23219

## EXHIBIT B

VIRGINIA:

Aug. 8, 1972

IN THE INDUSTRIAL COMMISSION OF VIRGINIA

JOHN R. DILLARD, CLAIMANT

v.

ROANOKE MILLS, INC., EMPLOYER

and

AETNA CASUALTY AND SURETY COMPANY, INSURER

I.C. #169-570

## ORDER

This day came the parties hereto and filed their petition for approval of compromise agreement whereby the employer and insurer will pay to John R. Dillard as a lump sum, the amount of FOUR THOUSAND TWO HUNDRED FORTY THREE AND 20/100 (\$4,243.20) in consideration of the employer and insurer being forever released and discharged by the claimant from any compensation or medical payments that may be now due or hereafter become due by reason of the accident which occurred to the claimant on March 15, 1971.

Upon consideration whereof from statements made in the petition and by the parties in person and through counsel and the medical reports filed herein, the Commission being of the opinion that the best interest of the claimant would be served by approving the compromise settlement as set forth in the said petition,

IT IS ORDERED that the said agreement be and the same hereby is approved and it is FURTHER ORDERED that from the sum of FOUR THOUSAND TWO HUNDRED FORTY THREE AND 20/100 (\$4,243.20) nothing is to be paid to John Levy, attorney for the claimant for legal services rendered and that the balance in the

sum of \$4,243.20 be paid to John R. Dillard, claimant, as a lump sum.

IT IS FURTHER ORDERED that upon payment of the sum of FOUR THOUSAND TWO HUNDRED FORTY THREE AND 20/100 (\$4,243.20), the said Roanoke Mills, Inc. and the Aetna Casualty and Surety Company shall be released and forever discharged from any and all liability upon them by reason of the injury to claimant which occurred on March 15, 1971.

ENTER: August 7, 1972

/s/ THOMAS P. HARWOOD, JR.  
Commissioner

We ask for this:

/s/ JOHN R. DILLARD  
John R. Dillard

/s/ ELIZABETH DILLARD  
Witness

ROANOKE MILLS, INC.  
and  
AETNA CASUALTY AND SURETY COMPANY

By /s/ [Illegible]  
Of counsel

By /s/ JOHN LEVY  
John M. Levy,  
Counsel for John R. Dillard

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

[Title Omitted in Printing]

MOTION TO DISMISS

Now come the defendants, Industrial Commission of Virginia, Thomas M. Miller, Chairman, M. Edward Evans and Thomas P. Harwood, Jr., Commissioners, by counsel, and move the Court for the entry of an order dismissing the complaint, pursuant to Rule 12(b)(6), Fed. R. Civ. P., for failure to state a claim on which relief could be granted. In support of said motion, defendants say as follows:

1) Plaintiff alleges that Rule 13 of the Rules of the Industrial Commission of Virginia, promulgated pursuant to § 65.1-18 of the Code of Virginia (1950), as amended, is violative of due process rights because it allows workmen's compensation benefits to be terminated by the insurer prior to the holding of an evidentiary hearing, and he asks that defendants be enjoined from enforcing said Rule. Rule 13 provides, in pertinent part, as follows:

"All applications for hearing by employer or insurance carrier under § 65-95 [now § 65.1-99] shall show the date through which compensation benefits have been paid. No application shall be considered by the Commission until all compensation under the outstanding award has been paid to the date such application is filed with the Commission. Except, that in any case in which the employee has actually returned to work or has refused employment (§ 65-60 [now § 65.1-63]), medical attention (§ 65-85 [now § 65.1-88]), or medical examination, or as of a date fourteen days prior to the date the application is filed, whichever is later. In such cases the application will be considered and determined as of the date of return to work, or refusal, or as of a date four-

teen days prior to the date the application is filed, whichever is later."

Defendants point out that the operation of Rule 13 inures to the employee's *benefit*, not to his detriment, since in the absence of Rule 13 (the relief requested by plaintiff) the insurer would be permitted to cut off benefits unilaterally at *any* time, regardless of when it filed its application, whereas Rule 13 requires that payments be continued up to the date of filing the application for hearing or said application will not be considered. As the Supreme Court of Virginia noted in *Parker v. Manchester Board & Paper Co., Inc.*, 201 Va. 328, 111 S.E.2d 453 (1959):

"More than thirty years ago when it was found by the Commission that some employers were arbitrarily disregarding the effect of outstanding awards and terminating payments direct by such awards, a Rule—the same now before us—was promulgated providing that compensation be paid to the date application was made for a proper termination under § 65-95 (then § 1887(47)) [now § 65.1-99]. The Rule has since been continually in force."

Thus it appears that what the plaintiff really seeks is not the *abolition* of Rule 13, but its *extension* to require that compensation be paid up to the date of the hearing—in other words, the promulgation of a Rule 13(a). This goal must be achieved through the legislative process of the General Assembly or the Industrial Commission.

2) Regardless of any need for reform of the Virginia workmen's compensation procedures in order to better provide for indigent claimants, no federal question is presented by any shortcoming of the existing system. Workmen's compensation, although regulated by a statutory framework, is a substitute for the common-law tort action and is participated in *voluntarily* by plaintiff and all others similarly situated. Sections 65.1-23 and 65.1-26 of the Code of Virginia detail the method by which an employee may exempt himself from the provisions of the



Workmen's Compensation Act, and § 65.1-44 specifically provides that any employee so exempt has the right to proceed at common law. One who chooses to participate, therefore, in a program which provides him with a better remedy than he would otherwise have had cannot complain that due process requires that he be entitled to the best of all possible remedies, or one which would do more for him than the one provided. In short, if plaintiff chose to be covered by workmen's compensation, he must take the system as he finds it.

3) Unlike *Goldberg v. Kelly*, 397 U.S. 253, 91 S.Ct. 1011 (1970), no state fund is involved in the payments to recipients of workmen's compensation. Payments come from insurance carriers or firms which act as self-insurers. These carriers, as private parties, should not be held to the same balancing-or-interests criteria as were state and local governments in *Goldberg v. Kelly*, *supra*, since they have no opportunity to recoup benefits wrongfully paid.

4) Virginia's statutory framework does not authorize the *termination* of benefits as alleged by plaintiff, it permits only the initiation of a procedure by which benefits may ultimately be terminated. Should plaintiff be dissatisfied with the temporary cessation of benefits pending an administrative hearing, he is entitled by the provisions of § 65.1-100 to reduce his award to judgment in an appropriate court of record and compel the resumption of benefits. It should be noted that in such a case the court has no discretion and must enter judgment against the employer or his insurer. *Parrigen v. Long*, 145 Va. 637, 134 S.E. 562 (—); *Richmond Cedar Works v. Harper*, 129 Va. 481, 106 S.E. 516 (—). Finally, any questions whether the Virginia statutory scheme permits the type of termination alleged by plaintiff should properly

be first determined by Virginia courts rather than by this Court.

INDUSTRIAL COMMISSION OF  
VIRGINIA

THOMAS M. MILLER

M. EDWARD EVANS

THOMAS P. HARWOOD, JR.

By: /s/ VANN H. LEFCOE  
Counsel

Andrew P. Miller  
Attorney General of Virginia

Vann H. Lefcoe  
Assistant Attorney General

Anthony F. Troy  
Assistant Attorney General  
Supreme Court Building  
Richmond, Virginia

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

[Title Omitted in Printing]

INTERROGATORIES TO DEFENDANTS INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER, M. EDWARD EVANS and THOMAS P. HARWOOD, JR.

Plaintiff requests that Defendants, Industrial Commission of Virginia, Thomas M. Miller, M. Edward Evans and Thomas P. Harwood, Jr. answer under oath the following interrogatories within thirty days. One answer to each said interrogatory, if agreed upon by all said Defendants, will be sufficient for all said Defendants.

1. State the total number of employees in the State of Virginia covered by the provisions of the Virginia Workmen's Compensation Act, for each one of the following years: 1967, 1968, 1969, 1970 and 1971.

2. State the total number of employers in the State of Virginia covered by the provisions of the Virginia Workmen's Compensation Act, for each one of the following years: 1967, 1968, 1969, 1970 and 1971.

3. State the number of employees in the State of Virginia who are recorded as having filed a notice of exemption pursuant to Sections 65.1-23, 65.1-25 and 65.1-26 of the Code of Virginia, as amended. Also state the number of said notices filed in each one of the following years: 1967, 1968, 1969, 1970 and 1971.

4. State the number of employers in the State of Virginia who are self-insurers, under Section 65.1-108 of the Code of Virginia, as amended; and state the number of employees of each of such employers.

5. State the number of memoranda of agreements, pursuant to Sections 65.1-45 and 65.1-93 of the Code of Virginia, as amended, which have been approved by the Industrial Commission of Virginia in each one of the following years: 1967, 1968, 1969, 1970 and 1971.

6. State the number of memoranda of agreement, pursuant to Sections 65.1-45 and 65.1-93 of the Code of Vir-

ginia as amended, which were not approved by the Industrial Commission of Virginia in each one of the following years: 1967, 1968, 1969, 1970 and 1971.

7. State the number of hearings held pursuant to Section 65.1-94 of the Code of Virginia, as amended, for each one of the following years: 1967, 1968, 1969, 1970 and 1971, in the following categories:

- (a.) On a failure to reach an agreement in regard to compensation.
- (b.) On a disagreement as to the continuance of any weekly payments under an agreement.

8. For the hearings set out in the answers to Interrogatory Number 7(a) and (b), state for each one of the following years: 1967, 1968, 1969, 1970 and 1971:

- (a.) The average length of time between the application for such a hearing and the notification of the parties of the decision by the Commission.
- (b.) The greatest length of time and the shortest length of time between the application for such a hearing and the notification of the parties of the decision by the Commission.

9. State the number of rehearings on award, pursuant to Section 65.1-97 of the Code of Virginia, as amended, which were held in each of the following years: 1967, 1968, 1969, 1970 and 1971.

10. For the rehearings set out in the answers to Interrogatory Number 9, state for each one of the five years:

- (a.) The average length of time between the application for review and the hearing or review of the evidence by the Commission.
- (b.) The greatest length of time and the shortest length of time between the application for review and the hearing or review of the evidence by the Commission.
- (c.) The average length of time between the hearing or review of the evidence and the decision of the Commission.

- (d.) The greatest length of time and the shortest length of time between the hearing or review of the evidence and the decision of the Commission.
- (e.) The number of decisions which changed the award.

11. State whether or under what conditions, an award is continued to be paid if an application for review is made pursuant to Section 65.1-97 of the Code of Virginia, as amended.

12. State the number of reviews of awards which were held by the Commission pursuant to Section 65.1-99 of the Code of Virginia as amended, for each one of the following years: 1967, 1968, 1969, 1970 and 1971.

13. For the reviews set out in the answers to Interrogatory Number 12, state for each one of the five years the number of such reviews which were initiated upon:

- (a.) Motion of the Commission.
- (b.) Application of the employee who had been injured.
- (c.) Application of the employer, including his insurer.

14. For the reviews set out in the answers to Interrogatory Number 12, state for each one of the five years:

- (a.) The average length of time between the date of the motion or application and the date the hearing or review was completed.
- (b.) The greatest length of time and the shortest length of time between the date of the motion or application and the date the hearing or review was completed.
- (c.) The average length of time between the completion of the hearing or review and the notification of the parties of the decision.
- (d.) The greatest length of time and the shortest length of time between the completion of the hearing or review and the notification of the parties of the decision.

15. For the reviews set out in the answers to Interrogatory Number 12, state for each one of the five years the number of decisions in which the award was:

- (a.) Ended.
- (b.) Diminished.
- (c.) Increased.

16. State the number of judgments on agreements or awards, under Section 65.1-100 of the Code of Virginia, as amended, which were obtained in each one of the following years: 1967, 1968, 1969, 1970 and 1971.

17. State the number of employers and employees who have voluntarily elected to be bound by the Virginia Workmen's Compensation Act, for each one of the following years: 1967, 1968, 1969, 1970 and 1971.

18. Describe in detail the procedures by which the approval or disapproval of the defendant Commission is given to the policies of insurance pursuant to Section 65.1-113 of the Code of Virginia, as amended.

Respectfully submitted,

/s/ John Levy  
JOHN M. LEVY  
10 S. 10th Street  
Richmond, Virginia 23219  
Kurt Berggren  
702 Shenandoah Avenue,  
N.W.  
Roanoke, Virginia 24016  
Attorneys for Plaintiff

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

[Title Omitted in Printing]

ANSWER

Aetna Casualty and Surety Company ("Aetna") for its answer, states the following:

1. Defendant denies the conclusionary allegations of Paragraphs 1 and 2 in that Aetna does not believe that a cause of action is created by Section 1983 and that the other provisions do not, therefore, establish jurisdiction of this Court.

2. Paragraph 3 does not require a response.

3. Aetna does not have sufficient facts to enable it to form a belief as to the truth or accuracy of the allegations contained in Paragraph 4 except that it does admit that plaintiff has been receiving \$40.80 per week from defendant.

4. Defendant denies all conclusionary allegations in Paragraph 5 including the allegations that there are common questions of law affecting all members of the alleged class, that plaintiff's claims are typical of the alleged class claims and that plaintiff will fairly and accurately represent the interests of the members of the alleged class.

5. Defendant admits the allegations in Paragraphs 6, 7, 8, 9, 10, 11, 12 and 13.

6. Defendant does not have sufficient facts or information to enable it to form belief as to the truth or accuracy of the allegations of Paragraph 14.

7. Defendants denies the allegations of Paragraph 15.

WHEREAS, having fully answered the Complaint herein, defendant Aetna Casualty and Surety Company

moves the Court to dismiss the Complaint herein with costs to be taxed against plaintiff.

Respectfully submitted,  
AETNA CASUALTY AND  
SURETY COMPANY

By /s/ [Illegible]  
Of Counsel

Willard I. Walker  
J. Robert Brame, III  
McGuire, Woods & Battle  
1400 Ross Building  
Richmond, Virginia 23219

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

[Title Omitted in Printing]

ANSWERS TO INTERROGATORIES

Now come the defendants, Industrial Commission of Virginia et als, and for answers to the Interrogatories served by the plaintiff herein say as follows:

1) Unknown. There are no records available to the Commission from which such information could be compiled.

- 2) 1967-60,263  
1968-64,082  
1969-66,030  
1970-69,908  
1971-75,919

3) Approximately 900 per year.

- 4) 125-Corporate self-insurers  
10-School Boards  
13-Cities  
23-State Agencies  
Approximately 140,000 employees, exclusive of  
School boards, Cities and State Agencies.

- 5) 1967-19,030  
1968-19,288  
1969-20,303  
1970-21,017  
1971-21,264

6) No specific figures are available but answers may be derived from defendants' business records which are maintained at the offices of the Industrial Commission of Virginia, Blanton Building, Richmond, Virginia. In accordance with Rule 33(c), Fed.R.Civ.P., counsel for plaintiff will be afforded a reasonable opportunity to examine, audit or inspect these records and to make copies, compilations, abstracts or summaries.

- 7) (a) 1967-1020  
 1968-1200  
 1969-1320  
 1970-1532  
 1971-1542  
 (b) 1967- 680  
 1968- 800  
 1969- 880  
 1970-1020  
 1971-1028
- 8) (a) Approximately three months.  
 (b) Approximately one month to eight months.
- 9) 1968-118  
 1969-140  
 1970-136  
 1971-133
- 10) Approximately: (a) One month.  
 (b) Two weeks to two months.  
 (c) One week.  
 (d) One day to thirty days.  
 (e) 5%.

11) Awards are occasionally continued voluntarily during an application for review where only the specific rating of disability is in issue.

12) Same Answer 7(b).

- 13) (a) Three a year.  
 (b) 1967-408 (Employers & insurers)  
 1968-480  
 1969-528  
 1970-612  
 1971-616  
 (c) 1967-272 (Employees)  
 1968-320  
 1969-352  
 1970-408  
 1971-410

14) See Answer 6.

15) See Answer 6.

16) Unknown. Approximately thirty (30) decisions are certified each year. No information is available on number of judgments obtained.

17) Employers—same as Answer 2.

Employees—same as Answer 1.

18) Standard workmen's compensation insurance policies are approved by the State Corporation Commission, which approval is accepted prima facie by defendants.

INDUSTRIAL COMMISSION OF  
VIRGINIA

Thomas M. Miller

M. Edward Evans

Thomas P. Harwood, Jr.

By: /s/ Thomas M. Miller  
Commissioner

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

[Title Omitted in Printing]

ANSWER

Now come the defendants Industrial Commission of Virginia, Thomas M. Miller, M. Edward Evans and Thomas P. Harwood, Jr., Commissioner, by counsel and for answer to the bill of complaint filed herein say as follows:

1) The allegations contained in paragraphs 1, 2 and 3 of the bill of complaint state conclusions of law which do not require an answer.

2) Defendants are without knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 4 except that defendants admit that plaintiff has been awarded the sum of \$40.80 per week as workman's compensation by defendant Commission to be paid by defendant Aetna.

3) The allegations contained in paragraph 5 of the complaint state conclusions of law which do not require an answer.

4) The allegations contained in paragraphs 6 through 13 of the complaint are admitted.

5) Defendants are without information sufficient to form a belief as to the truth of the allegations contained in paragraph 14.

6) The allegations contained in paragraph 15 of the complaint state conclusions of law which do not require an answer.

7) Defendants reaffirm and incorporate herein the defenses heretofore raised in their Motion to Dismiss previously filed in this case on November 10, 1971.

Wherefore, defendants pray that the bill of complaint be dismissed and they be permitted to go hence with their costs.

INDUSTRIAL COMMISSION OF  
VIRGINIA

Thomas M. Miller  
M. Edward Evans  
Thomas P. Harwood, Jr.

By /s/ Anthony F. Troy  
Counsel

Andrew P. Miller  
Attorney General  
Anthony F. Troy  
Vann H. Lefcoe  
Assistant Attorneys General  
Supreme Court-Library Building  
Richmond, Virginia 23219

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

[Title Omitted in Printing]

STIPULATIONS OF FACTS

It is hereby stipulated and agreed by and between the plaintiff and the defendants, through their respective attorneys, that the following facts are not in issue in the above-style action:

1. John R. Dillard is a citizen of the United States and a resident of Virginia. On March 15, 1971, John R. Dillard had an accident arising out of and in the course of his employment.

2. The Industrial Commission of Virginia, on April 7, 1971, approved a memorandum of agreement entered into March 30, 1971 for the payment of compensation under the Workmen's Compensation Act and awarded John R. Dillard forty dollars and eighty cents (\$40.80) per week, during his incapacity, beginning on March 23, 1971.

3. Aetna Casualty and Surety Company on June 3, 1971, filed an application for Hearing, pursuant to Section 65.1-99 of the Code of Virginia, as amended, and Rule 13 of the Rules of the Industrial Commission of Virginia.

4. John R. Dillard's compensation under the Memorandum of Agreement entered into on March 30, 1971, was discontinued by Aetna Casualty and Surety Company immediately after the Application for Hearing was filed on June 3, 1971.

5. On July 16, 1971, a hearing was held by the Industrial Commission of Virginia on Aetna Casualty and Surety Company's Application to determine whether there had been a change in John R. Dillard's condition which would enable him to return to work.

6. On August 25, 1971, Commissioner M. Edward Evans found that John R. Dillard was still unable to return to work, awarded him all accrued compensation

back to June 3, 1971 and directed that compensation be resumed under the outstanding award.

7. On September 16, 1971, Aetna Casualty and Surety Company filed an Application for Hearing pursuant to Section 65.1-99, of the Code of Virginia, as amended, and Rule 13 of the Industrial Commission of Virginia.

8. John R. Dillard's compensation under the Memorandum of Agreement and Opinion of Commissioner M. Edward Evans, was discontinued by Aetna Casualty and Surety Company immediately after the Application for Hearing was filed on September 16, 1971.

9. The defendants named as Commissioners of the Industrial Commission of Virginia have the authority to establish and alter the Rules of the Industrial Commission of Virginia.

/s/ [Illegible] Attorney for Plaintiff	3/ 9/72 Date
/s/ [Illegible] Attorney for Defendants,	3/10/72 Date
/s/ [Illegible] Attorney for Defendant	3/14/72 Date

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

[Title Omitted in Printing]

MOTION FOR SUMMARY JUDGMENT

Now come the defendants, Industrial Commission of Virginia et als, and move the Court for the entry of an order awarding them summary judgment pursuant to Rule 56, Fed.R.Civ.P. In support of said motion, defendants say as follows:

1) On March 21, 1972, the defendant Industrial Commission amended its Rule 13 as shown in the underlined language on the attached certified copy of the Commission's minutes (Exhibit C). The aforesaid amendment became effective on April 1, 1972.

2) The effect of the amendment to Rule 13 is to require that an *ex parte* inquiry be held by the Commission to determine whether probable cause exists for a change in the award before any benefits may be temporarily suspended pending a full hearing. Defendants submit that amended Rule 13 guarantees due process of law to claimants under the Virginia workmen's compensation laws, and that the instant case should be dismissed.

INDUSTRIAL COMMISSION OF  
VIRGINIA

Thomas M. Miller

M. Edward Evans

Thomas P. Harwood, Jr.

By: /s/ Vann H. Lefcoe  
Counsel

Andrew P. Miller  
Attorney General

Vann H. Lefcoe  
Anthony F. Troy  
Assistant Attorneys General  
Supreme Court Building  
Richmond, Virginia 23219

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## EXHIBIT C

MINUTES OF THE MEETING OF  
THE INDUSTRIAL COMMISSION OF VIRGINIA

March 21, 1972

Present: Thomas P. Harwood, Jr., Chairman  
M. E. Evans, Commissioner  
Thomas M. Miller, Commissioner

It is ordered that Rule 13, Rules of the Industrial Commission, as heretofore amended, be, and it is hereby further amended, effective April 1, 1972, to read as follows:

Rule 13. Applications for Review on Ground of Change in Condition.—Applications for review under § 65.1-99 of the Act must be in writing and state the ground relied upon for relief. Reviews of awards on the ground of a change in condition shall be determined as of the date of the filing of the application in the offices of the Commission, except as provided in paragraphs two and three hereof.

All applications for hearing by an employer or insurer under § 65.1-99 shall show the date through which compensation benefits have been paid. No application shall be considered by the Commission until all compensation under the outstanding award has been paid to the date such application is filed with the Commission. Except, that in any case in which the employee has actually returned to work or has refused employment (§ 65.1-63), medical attention (§ 65.1-88), or medical examination (§ 65.1-91), compensation may be terminated as of the date the employee returned to work or refused employment, medical attention or medical examination, or as of a date fourteen days prior to the date the application is filed, whichever is later. In such cases the application will be considered and determined as of the date of return to work, or refusal, or as of a date fourteen days prior to the date the application is filed, whichever is later. All applications by an employer

or insurer shall be under oath and shall not be deemed filed and benefits shall not be suspended until the supporting evidence which constitutes a legal basis for changing the existing award shall have been reviewed by the Commission, or such of its employees as may be designated for that purpose, and a determination made that probable cause exists to believe that a change in condition has occurred.

All applications for hearing by an employee on the ground of further work incapacity shall be considered and determined as of the date incapacity for work actually begins, or as of a date fourteen days prior to the date the application is filed, whichever is later.

INDUSTRIAL COMMISSION OF  
VIRGINIA

/s/ Thomas P. Harwood, Jr.  
Chairman

Attest: /s/ Helen G. Cooper  
Secretary

CERTIFIED—March 30, 1972

[SEAL] INDUSTRIAL COMMISSION OF VIRGINIA

/s/ Helen G. Cooper  
HELEN G. COOPER  
Secretary of Commission

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

Civil Action No. 537-71-R

[Filed, Jul. 17, 1972, Clerk,  
U. S. Dist. Court, Richmond, Va.]

JOHN R. DILLARD, etc., PLAINTIFF,

v.

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER,  
Chairman, Industrial Commission of Virginia, M. ED-  
WARD EVANS, THOMAS P. HARWOOD, JR., Commissioners  
of the Industrial Commission of Virginia, and AETNA  
CASUALTY AND SURETY COMPANY, DEFENDANTS

OPINION

Plaintiff brings this action on behalf of himself and all other persons similarly situated, challenging the constitutionality of a Rule of the Industrial Commission of Virginia (Commission). He asserts the Commission approved a memorandum of agreement entered into between Aetna Casualty & Surety Company (Aetna), insurance carrier for Roanoke Mills, Incorporated, and himself, for the payment of a weekly sum beginning March 23, 1971, and to continue during his incapacity, with medical benefits. Thereafter, Aetna filed a petition with the Commission asserting a change of condition and ceased payment on and after the date of the filing of the petition. It subsequently resumed payment.

The limited issue before the Court is whether Rule 13 of the Rules of the Commission violates plaintiff's [and the class he purports to represent] rights to due process guaranteed by the Fourteenth Amendment to the Constitution of the United States. Plaintiff asserts that the Rule permits the termination of the payment of benefits by an employer or insurer, on the ground of a change

in the condition of the employee, prior to a full hearing on the merits by the Commission.

The Virginia Workmen's Compensation Act, Title 65.1 of the Code of Virginia, 1950, as amended, Volume 9, was enacted in 1968, Chapter 660 Acts of Assembly of 1968, to take effect October 1, 1968. It was a rewrite and revision of former Title 65. The first Workmen's Compensation Act of Virginia was adopted by the Legislature in 1918, Acts of Assembly of 1918, Chapter 400, page 640. It was modeled after and followed the Act adopted by the State of Indiana.

Pursuant to the Act, compensation is paid for all workmen coming within the provisions of the Act if injured during the course of their employment. The Act provides a system where employer and employee may escape personal injury litigation, and provides for the payment of compensation under fixed rules. It was a substitute of more certain and broader remedies for the previously existing inadequate common law rights and remedies, regardless of fault or negligence. The doctrines of contributory negligence, assumption of risk, fellow servant, and similar defenses, which frequently defeated recoveries and occupied the time of litigants and the courts, were abolished. The advantages are shared by the employer and employee. Damages resulting from an accident are treated as a part of the expense of operating the business. The Act, in effect, read into every contract of employment, within the provisions of the Act, the obligation of the employer to pay the employee for injuries. It provided an exclusive remedy in the field of industrial accidents, leaving the common law remedies to those incidents not covered by the Act.

A proceeding under the Act is not one for damages for a wrong done, but to obtain compensation for a loss sustained by reason of injury and disability. The employer's liability is not based upon tort, the rules of the common law for tort actions do not apply, and the rules of evidence are "so laxly" enforced that an award may be made on hearsay evidence alone if credible and not contradicted. *Glassco v. Glassco*, 195 Va. 239, 77 S.E.2d 843; *Burlington Mills Corporation v. Hagood*, 177 Va.

204, 13 S.E.2d 291; *Humphries v. Boxley Brothers Co.*, 146 Va. 91, 135 S.E. 890.

Workmen's Compensation benefits are not mandatory for the employee. By notice he may exempt himself from the terms of the Act and retain his common law rights. No such right exists for the employer. Virginia Code 65.1-23, etc.

The Commission, operating within the general legislative framework, and having both regulatory and judicial functions, is charged with the administration of the Act. When an employee is injured, he may enter into a "Memorandum of Agreement" with his employer or the employer's insurance carrier, stipulating the right to compensation, the average weekly wages, the amount of compensation, and the period of payment. The memorandum is then submitted to the Industrial Commission for approval. This was the procedure followed in the case at bar. If an agreement is not approved, or if the parties have not been able to agree, the matter is heard and determined by the Commission. Enforcement of the award is not with the Commission, but vested in a court of record of Virginia. Virginia Code Section 65.1-100.<sup>1</sup>

A review of an award may be had upon motion of the Commission or of any party in interest "on the ground of a change in condition." Virginia Code Section 65.1-99. Upon such review, the Commission may increase or decrease the compensation previously awarded, but no such review "shall affect such award as regards any money paid." Virginia Code 65.1-99.

Prior to the enactment of Rule 13 of the Commission, there was no provision in the Act or Rules to prevent an employer or insurer from ceasing payment of benefits at any time, asserting a change in condition, and either petitioning for an amendment or correction of the

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<sup>1</sup> Section 65.1-100 provides that any interested party may file in a court of record a copy of the memorandum of agreement approved by the Commission, or its order or decision, or its award, and the court shall render judgment in accordance therewith and notify the parties. Such judgment has the same effect as any other judgment rendered in that court. Such is the way for enforcement.

award, or waiting for the employee to proceed with action.<sup>2</sup>

To prevent the insurer or employer from following such procedure, the Commission, utilizing the authority granted by the Act—Virginia Code Title 65.1-17—enacted Rule 13, recently amended, which provides:

Applications for Review on Ground of Change in Condition.—Applications for review under § 65.1-99 of the Act must be in writing and state the ground relied upon for relief. Reviews of awards on the ground of a change in condition shall be determined as of the date of the filing of the application in the offices of the Commission, except as provided in paragraphs two and three hereof.

All applications for hearing by an employer or insurer under § 65.1-99 shall show the date through which compensation benefits have been paid. No application shall be considered by the Commission until all compensation under the outstanding award has been paid to the date such application is filed with the Commission. Except, that in any case in which the employee has actually returned to work or has refused employment (§ 65.1-63), medical attention (§ 65.1-88), or medical examination (§ 65.1-91), compensation may be terminated as of the date the employee returned to work or refused employment, medical attention or medical examination, or as of a date fourteen days prior to the date the application is filed, whichever is later. In such cases the application will be considered and determined as of the date of return to work, or refusal, or as of a date fourteen days prior to the date the application is filed, whichever is later. *All applications by an employer or insurer shall be under oath and shall not be deemed filed and benefits shall not be suspended until the supporting evidence which con-*

<sup>2</sup> In such event the employee could petition the Commission for an amendment of the award as provided in § 65.1-99, or proceed with enforcement of his existing award under the provisions of Virginia Code § 65.1-100.

*stitutes a legal basis for changing the existing award shall have been reviewed by the Commission, or such of its employees as may be designated for that purpose, and a determination made that probable cause exists to believe that a change in condition has occurred.*

All applications for hearing by an employee on the ground of further work incapacity shall be considered and determined as of the date incapacity for work actually begins, or as of a date fourteen days prior to the date the application is filed, whichever is later.

**NOTE:** The underlined portion represents the language of the amendment which became effective April 1, 1972.

Neither the statute, nor the Rule enacted, make any provision for the employer or insurer to cease payments. They merely provide that upon a change in condition the Commission may review any prior award and make a new award ending, diminishing or increasing the compensation previously awarded. The statute makes no grant to the Commission to stop an award previously granted prior to a review by the Commission. Rule 13, enacted by the Commission, sets forth the procedure to be followed upon the filing of a petition alleging a "change in condition." In effect, it provides the application for review (a) must be in writing, under oath, and state the grounds for relief, (b) the review will be determined as of the date of the filing of the application, (c) it must show the date through which compensation has been paid, (d) no application will be considered until compensation has been paid to the date of the filing, and (e) the application shall not be deemed filed and benefits shall not be suspended until the supporting evidence which constitutes a legal basis for changing the existing award has been reviewed by the Commission, and a determination made that probable cause exists to believe that a change in condition has occurred. An exception exists where an employee (a) has returned to work, or (b) has refused employment, medical attention or medical examination.



Nowhere in the Rule does it authorize or direct the employer or insurer to cease payments before a full hearing. It merely provides the Commission will not hear the petition of the employer or insurer asserting any change in condition if payments under the award have not been made up to the date the application is deemed filed, with an admonition that benefits *shall not* be suspended until the supporting evidence submitted with the petition has been reviewed and it is determined probable cause exists to believe a change has occurred, and if a finding of probable cause is made, the application will then be deemed filed. Here again, it does not authorize or direct suspension of payments, but merely provides the insurer or employer may not have a hearing on an alleged change of condition unless and until the provisions of the Rule are complied with. The determination of "probable cause" is to be made from an examination of "supporting evidence which constitutes a legal basis" for changing the existing award. Nowhere does the Rule say the determination may be made without notice to the employee and a chance to be heard. The mere fact such an inference may exist—a determination without notice to the employee and an opportunity to be heard—does not render the language objectionable on its face. *Lindsey v. Normet*, 405 U.S. 56, 65. The amendment to the Rule is new and the evidence does not indicate what the Commission will require in the way of supporting evidence to constitute a legal basis for establishing probable cause to believe a change in condition has occurred. As pointed out above, any payments made prior to the filing of the petition and prior to the Commission's authorizing a change of the award are not recoverable by the employer or insurer. Virginia Code Section 65.1-99. To discourage unwarranted applications for cessation of payments or other abuses, the Act provides that if employer or insurer bring, prosecute or defend any proceeding without reasonable grounds, the Commission or court may assess them with all of the costs, including a reasonable attorney's fee for any counsel appearing for the employee. Virginia Code Section 65.1-101.



It must be kept in mind that the award is for a stipulated sum per week "during incapacity." It is not an unlimited award. When incapacity ceases, the award ceases to exist.

Plaintiff's attack upon the Rule<sup>3</sup> is that it authorizes the insurer or employer to cease payments without meeting the requirements of due process. He says it permits a change in the award without the holding of a full-scale hearing at which he may be permitted to present evidence and contest any contentions made by the insurer or employer. Plaintiff makes no contention that he is denied the opportunity of a full-scale hearing with the assistance of counsel, when the application for a review is heard by the Commission.

The average time between the filing of an application for a review of the award on an alleged change in condition and the full-scale hearing by the Commission is one month. But even assuming that the Rule does not provide for notice and a hearing to the employee prior to termination of the award, and that the Rule is authority for the employer or insurer to terminate payments, under the facts and circumstances in this case the State function involved does not constitute a denial of due process. A full due process hearing is provided with the right of appeal to the highest court of the State and any determination favorable to the employee results in full retroactive payments.

The very nature of due process negates any concept of inflexible procedure universally applicable to every imaginable situation. As early as *Hagar v. Reclamation District No. 108*, 111 U.S. 701, 707-708, the Court said "that by due process is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected." Numerous definitions have been given of due process varying from that set forth in *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 162-163, saying it represents "a profound attitude of fairness between man and man, and more particularly between the

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<sup>3</sup>He makes no attack upon the language of the statute, but only the Rule enacted by the Commission.

individual and government . . . ,” to saying, as was done in *Hannah v. Larche*, 363 U.S. 420, 442, that it “embodies the differing rules of fair play, which through the years have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.” In *Bowles v. Willingham*, 321 U.S. 503, dealing with administrative action, the Court at page 520 said:

To be sure, that review comes after the order has been promulgated; and no provision for a stay is made. But as we have held in *Yakus v. United States*, *supra*, that review satisfies the requirements of due process. As stated by Mr. Justice Brandeis for a unanimous Court in *Phillips v. Commissioner*, 283 U.S. 589, 596-597: “Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. *Springer v. United States*, 102 U.S. 586, 593; *Scottish Union & National Ins. Co. v. Bowland*, 196 U.S. 611, 631.

As was pointed out in *Torres v. New York State Department of Labor*, 321 F.Supp. 432 (S.D. N.Y. 1971)<sup>4</sup>, at page 437:

The concept of due process does not involve a set of fixed, unalterable principles. “[C]onsideration of what procedures due process may require under any give set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the public interest that has been affected by Governmental action.” *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230

<sup>4</sup> Cert. denied 405 U.S. 949.

(1961). See *Goldberg v. Kelly*, *supra*, 397 U.S. at 263, 90 S.Ct. 1011, at 1018.

The touchstones in the area of procedural due process and the test of whether one has been afforded due process is one of fundamental fairness and reasonableness in the light of the total circumstances. *Anti-Fascist Committee v. McGrath*, *supra*; *Whitfield v. Simpson*, 312 F.Supp. 889 (E.D. Ill. 1970); *Sigma Chi Fraternity v. Regents of University of Colorado*, 285 F.Supp. 515 (D.C. Cal. 1966); *Due v. Florida A & M*, 323 F.Supp. 296 (D.C. Fla. 1963).

The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the request hearing is held before the final order becomes effective. *Inland Empire Council v. Millis*, 325 U.S. 697, 710; *Bowles v. Willingham*, 321 U.S. 503, 519-521; *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152-153.

The payment of sums awarded under the Workmen's Compensation Act is entirely different from payment of welfare. As was pointed out in *Torres v. New York State Department of Labor*, *supra*, Workmen's Compensation payments like unemployment compensation differ from relief in that each are made as a matter of right, not on a needs basis, but only while the worker is involuntarily unemployed. They are based on wages previously received and are completely unrelated to need. [321 F. Supp. 437].

This is not a case of "brutal need" or "overpowering need" which existed in *Goldberg v. Kelly*, 397 U.S. 254. The Court pointed out in the *Torres* case, an employee cut off from Workmen's Compensation "may qualify for welfare payments, if he can show the requisite need. Thus the worst possible effect of the procedure which plaintiffs attack as being lacking in due process would be that for a period of a few weeks until a hearing is held a claimant who is finally determined to be eligible for payments would have to live on his accumulated savings or, if he had no savings, would have to resort to relief.

If he is eventually found to be eligible he will receive retroactively all the payments to which he was entitled." Here, unlike in *Torres* where there was a right to recover back any sums improperly paid, no such right exists under the Workmen's Compensation Act. In addition, the Commission may assess all of the costs, including a reasonable attorney's fee for employee's counsel, against an insurer or employer who brings any such proceeding without reasonable grounds.

The award is during incapacity. When incapacity ceases, the award ceases. Let us suppose there was an award for the lifetime of the injured. To be sure, due process does not mean the award could not be terminated upon the death of the employee without a full-scale hearing. Under the award, when the employee regains capacity the award terminates. If plaintiff's contentions are correct, if an employee regains capacity to return to employment, or even if he obtains other employment, employer or insurer could not stop payments under the award until there was notice and an opportunity for him to be heard. Payments made between the time of his regaining capacity are not recoverable by the employer or insurer. As the Court pointed out in *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, due process does not require a trial-type hearing in every conceivable case of government impairment of private interest, nor where an official may have abused his discretion. "It is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination. *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599; *Phillips v. Commissioner*, 283 U.S. 589, 596-597; *Bowles v. Willingham*, 321 U.S. 503, 520; *Yakus v. United States*, 321 U.S. 414, 442-443.

Plaintiff attempts to equate Workmen's Compensation payments with welfare benefits and affix to each of them a label of "brutal need." But, as the Court pointed out in *Richardson v. Belcher*, 404 U.S. 78, 83, discrimination "between two like classes cannot be rationalized by assigning them different labels, but neither can two unlike

classes be made indistinguishable by attaching to them a common label." *Torres* held "brutal need" could not be equated with Unemployment Compensation. Neither can it be equated with Workmen's Compensation.

The situation here is much like that referred to in Mr. Justice Black's dissent, joined in by Chief Justice Burger, in *Goldberg* [397 U.S. 254, 277] where one party owing another money ceases payment. The payee has a right of action against payor, but there is no provision in law that before payor ceases payments, he must give notice and an evidentiary hearing be held. Here employee has an award of weekly compensation by agreement between the parties, approved by the Industrial Commission, to continue during incapacity. Power of enforcement is not in the Commission. The Commission can order payment, but cannot enforce it. Enforcement is with a court of record. Requesting a hearing on an alleged change of condition, and the fixing of a time for it, do not invalidate or change the award. Employee can still proceed with the same action for collection which he would take if the employer or insurer merely ceased payments without asserting any change in condition or making a request for a hearing.

For the reasons hereinabove stated, the complaint and this action are dismissed.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

Civil Action No. 537-71-R

JOHN R. DILLARD

v.

INDUSTRIAL COMMISSION OF VIRGINIA, et al

MERHIGE, J.—Dissenting

Because I conclude that my fellow judges have this day by their conclusions permitted the continued violation of constitutional rights of the plaintiff and the class which he represents, I must respectfully dissent from their views.

The matter comes before the Court without benefit of an evidentiary hearing. Nevertheless the pleadings, the answers to the interrogatories, the stipulations entered into between the parties, and the admissions at the bar of the Court during argument in this cause, in my opinion, establishes the following:

This is an appropriate class action and the named plaintiff is representative of that class of persons who, upon sustaining an injury while in the course of their employment, are recipients of workmen's compensation benefits in accordance with the provisions of Virginia's Compensation Act, Title 65, Code of Virginia, as amended. Rule 23 F.R.C.P.

The named plaintiff sustained an injury which entitled him to Workmen's Compensation payments in the amount of \$40.80 per week commencing on March 23, 1971, as evidenced by a Memorandum of Agreement entered into between the plaintiff and the defendant insurance company acting in place of his employer, and approved by the Industrial Commission of Virginia on March 30, 1971. Within less than three months thereafter these payments were discontinued by reason of Aetna having



filed an application for hearing before the Industrial Commission of Virginia, alleging that plaintiff had undergone a change in condition and was physically capable of resuming his employment. Approximately seven weeks thereafter a finding of the Commission resulted in plaintiff receiving the suspended payments and the continuation of same on a weekly basis. Within less than a month of a finding by the Commission that Dillard was entitled to the accrued compensation and a resumption of the directed compensation, Aetna once again filed an application for hearing alleging a change of condition, and payments once again were suspended and remained so until, upon agreement of Aetna and Dillard, the application for hearing was dismissed and compensation resumed.

The twice accomplished cessation of compensation was based upon the then existing Rule 13 of the defendant Commission, promulgated in accordance with § 65.1-18 of the Code of Virginia (1940).<sup>1</sup> The majority has set out the rule in toto which, as stated by the majority, was amended effective April 2, 1972, by adding the following sentence:

All applications by an employer or insurer shall be under oath and shall not be deemed filed and benefits shall not be suspended until the supporting evidence which constitutes a legal basis for changing the existing award shall have been reviewed by the Commission, or such of its employees as may be designated for that purpose, and a determination made that probable cause exists to believe that a change in condition has occurred.

It is this rule which is under constitutional attack as allegedly violating the due process clause of the Fourteenth Amendment to the Constitution of the United States.

My colleagues suggest that the amendment to the rule was brought about to preclude the cessation of payment of benefits upon an assertion by an employer of a change in condition, and they suggest that neither the statutory

<sup>1</sup> This section permits the Commission to promulgate rules not inconsistent with Act for carrying out its provisions.

scheme nor the amended rule "make any provision for the employer or insurer to cease payments." A reading of the rule clearly shows a contemplation that the benefits will be suspended upon compliance with the rule prior to the workman being given any opportunity to be heard or indeed even be advised that an application by his employer or insurer had been filed. The Industrial Commission itself, in its motion for summary judgment, describes the effect of Rule 13 as to "require that an *ex parte* inquiry be held by the Commission to determine whether probable cause exists for a change in the award before any benefits may be temporarily suspended pending a full hearing . . ."

Much is stated in the majority opinion as to what the rule allegedly does not do; the material fact, however, is that what it does do is to deprive the plaintiff and the members of his class of a property right without due process of law.

The Legislature of Virginia intended to make the Act exclusive in the industrial field, so that in the event of an accident the rights of all those so engaged would be governed solely thereby.

As pointed out by the majority, under the Act both employer and employee surrender former rights and gain certain advantages. Under the Act there is read into every contract of employment within the purview of the Act the obligation of an employer to pay specified compensation for injury to an employee arising out of his employment, and for an employee in consideration thereof to forego certain of his common law remedies.<sup>2</sup>

A provision seldom invoked permits an employee prior to an accident to give notice of his intention not to be covered by the Act. The answers to the interrogatories fail to indicate the total number of covered employees in the State, but do indicate that approximately 900 employees of a total of 75,919 employers chose to do so in 1971.

The Legislature of Virginia has accorded to the Industrial Commission, the promulgators of the rule in ques-

<sup>2</sup> *Feitig v. Chalkley*, 185 Va. 96, 38 S.E. 2d 73 (1946); *Fauver v. Bell*, 192 Va. 518, 65 S.E. 2d 575 (1951).



tion, the power to enforce the attendance of parties in interest and witnesses, as well as the production and examination of books, etc.

While the majority declares the questioned rule not to be violative of the constitutional right of due process, they describe the matter as one "wherein one party owing another money ceases payment. The payee has a right of action against payor, but there is no provision in law that before payor ceases payments he must give notice and an evidentiary hearing be held." (Majority opinion, p. 16).

If the suggestion be that the Fourteenth Amendment to the Constitution of the United States does not come into play by virtue of a lack of State action, even a perfunctory study of Virginia's statutory scheme as to the conduct of the parties in the field of workmen's compensation produces an inextricable and manifest enmeshment of a State agency to such a significant extent as to preclude any viable argument to the contra. We do not deal here solely with individual invasion of individual rights outside the State's responsibility under the Fourteenth Amendment. See *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963) and cases cited therein.

We deal here with a statewide regulation enacted by a state-constituted commission "functioning pursuant to a statewide policy and performing a state function." *Moody v. Flowers*, 387 U.S. 97, 102, 87 S.Ct. 1544, 1548 (1967); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970).

It appears to me that the majority puts much too much stress on the fact that an aggrieved workman ultimately receives a hearing. While it is quite true that the answers to the interrogatories indicate that the average time between the filing of an application for review of the award on alleged change in condition and the hearing by the Commission is one month, the same answers indicate that the time between an application for review and a hearing on any disagreement as to the continuance of weekly payments after same has been approved can run anywhere from one to eight months.

It is a basic principle of due process that an individual be given an opportunity for a hearing at a meaningful time and in a meaningful manner. In addition, the hearing must be appropriate to the nature of the case. See *Armstrong v. Manzo*, 380 U.S. 545, 552, 82 S.Ct. 1187, 1191 (1965); *Mullone v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 657 (1949). Except for extraordinary situations where some valid governmental interest is at stake, there is no justification for the postponement of a hearing until after the event has transpired. See *Boddie v. Connecticut*, 401 U.S. 371, 379 (1970).

I have searched in vain for a mention in the majority opinion as to what governmental interest is so important as to outweigh the rights of the plaintiff class to avoid loss prior to procedural due process, for the extent to which procedural due process must be afforded is influenced by the extent to which one may be condemned to suffer grievous loss. The United States Supreme Court has consistently stated that in consideration of what procedures due process may require under any given set of circumstances, one must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. See *Goldberg v. Kelly*, 397 U.S. 254, 263 (1969). The governmental concern which prompted the enactment of Virginia's Workmen's Compensation laws has been referred to time and time again by the Supreme Court of Appeals of Virginia. One of the primary purposes is to protect the employee so as to provide compensation to him for the loss of his opportunity to engage in work when his disability is occasioned by an injury suffered from an accident arising out of and in the course of his employment. The Act itself is to be liberally construed in harmony with its humane purposes. See *Burlington Mills Corp. v. Hagood*, 177 Va. 204, 13 S.E. 2d 291 (1941); *Rust Engineering Co. v. Ramsay*, 194 Va. 975, 76 S.E. 2d 195 (1953). Indeed the Legislature of Virginia was so concerned with the humane purposes of its Act that even an agreement reached between an employee and an employer may be approved only when

the Industrial Commission, or any member thereof, is clearly of the opinion that the best interests of the employee—will be served thereby. See Virginia Code § 65.1-93, as amended.

While the majority makes no mention of the precise nature of the governmental function or interest involved, it was suggested during argument that the giving of notice and a prior hearing would result in the need for additional employees to be retained by the defendant Commission. The answer is simple—such a statement is not supported by the evidence, and even if it could be the constitutional requirement of due process was in particular designed to protect the particular interest of the person whose rights are being affected, and was never intended to promote efficiency or to accommodate all possible interests. See *Goldberg v. Kelly*, *supra*. See also, *Fuentes v. Shevin, et al*, 40 U.S.L.W. 4692, note 22 (June 12, 1972).

It would seem that, if anything, governmental interests would be promoted by affording recipients of workmen's compensation their pre-termination evidentiary hearing, or at the very least an opportunity to submit documentary evidence prior to any cessation of benefits to which it has been adjudicated by the Commission they are entitled. The fact that the law of Virginia precludes any recovery of any payments made by an employer, to me simply points up the concern the Legislature had for the injured employee.

It is suggested that "the worst possible effect of the instant procedure would be that for a period of a few weeks until a hearing is held, a claimant who is finally determined to be eligible for payments would have to live on his accumulated savings or, if he had no savings, would have to resort to relief."<sup>3</sup> While there is no evidence to support any such supposition, the few weeks referred to by the majority insofar as the named plaintiff is concerned stretched into seven before the Commission made a finding resulting in the resumption of weekly

<sup>3</sup> This language was adopted by the majority from the language of the Court in *Torres v. New York State Dept. of Labor*, 321 F. Supp. 432, 437.

payments. The very suggestion that a member of the plaintiff class would have to resort to relief appears to me to point up that the governmental interest involved would be better served by the simple practice of giving notice and affording a hearing prior to cessation of benefits.

Judges need not blind themselves to what they know as men. I cannot help but believe that the average working man in Virginia, who has sustained an injury resulting in a substantial reduction of his weekly income, suffers a grave and immediate loss. The cessation of delivery of what may well be the necessities of life to a working man with a family is seldom preceded by any degree of formality. Where no valid State interest is involved, a court of all our institutions ought not be a party, even peripherally, by approving what on its face is manifestly unfair. It should be constantly kept in mind that the situation to which the plaintiff class addresses itself only arises subsequent to a determination that the particular member of the plaintiff class has been injured in his work and is entitled to compensation. I can think of no reason why notice and a hearing should not be given to the very person whom the Industrial Commission, by its approval of the original agreement for compensation, has found entitled to same under the law. The very thought that the *ex parte* proceeding permitted by Rule 13 may result in a cessation of milk delivery, or electric power, or fuel to a working man and his family, shocks my conscience.

I have no doubt that this is a case of "brutal need" similar to that in *Goldberg v. Kelly*, *supra*, yet I must say that the burden of showing such is, in my opinion, not necessary to find the rule in question violative of the Constitution. In *Fuentes v. Shevin*, *supra*, Mr. Justice Stewart succinctly points out that the Court's conclusions in *Goldberg* in no way marked a departure from established principles of procedural due process. *Goldberg* and *Sniadach v. Family Finance Corp.*, 395 U.S. 337, simply re-establish what has always been the law to the effect that due process requires an opportunity for a hearing before a deprivation of property takes effect. While, as Mr. Justice Stewart points out, the primary

issue in *Goldberg* was the form of hearing demanded by due process before determination of welfare benefits, hence the importance of welfare was directly relevant to that question just as in our instant case the relative weight of the claimant class' property interest is relevant to the formal notice and hearing which I believe is required by due process.

We deal here with established rights. Recipients of workmen's compensation are not beneficiaries of a hand-out. They are entitled to the funds they receive. Indeed the United States Supreme Court has held unconstitutional a determination by a State to suspend one's driver's license prior to notice and hearing. See *Bell v. Burson*, 402 U.S. 535 (1970).

One further comment on the majority's suggestion that the rule is drafted in such a way as to discourage unwarranted applications for cessation of payments by reason of that portion of the rule which permits the assessment of costs and unreasonable attorneys' fees against an employer. That portion of the rule does not come into effect until costs and attorneys' fees have been incurred by virtue of defending a proceeding "without reasonable grounds." It seems to me while the theory may sound well, as a practical matter it is useless. In the first place a workmen's compensation recipient, as it now stands under the rule, would not even know an application had been filed for cessation of his payments unless and until that fact occurred, and by that time the Commission has already, pursuant to its rule, found probable cause, which I believe can reasonably be interpreted as reasonable grounds. I can hardly see the threat of assessment of attorneys' fees or costs being of any consequence in the instant situation.

I respectfully suggest that my colleagues' dependence on *Torres v. New York States Dept. of Labor*, *supra*, n. 3, is misplaced, for first, that Court dealt with a prospective loss of government funds, whereas in our instant case no State funds are involved at all; and, in addition, the claimant made a weekly report to the State office. Provision was also made for one to be interviewed with respect to any new information which might affect his

eligibility for unemployment compensation. In our instant case a claimant is given no opportunity to be heard until after the fact. The *Torres* Court, finding an absence of "brutal need" which it interpreted as the basis for decision in *Goldberg, supra*, found that the governmental interest involved in its case outweighed plaintiff's claim. While I conclude from *Fuentes, supra*, that a reliance on a "brutal need" standard is misplaced, as I have endeavored to point out heretofore, the majority, while finding no brutal need situation in our instant case, conspicuously refrains from any reference to a superior governmental interest, a factor which I deem to be required.

Due process requires both notice and hearing prior to the deprivation of a right. Any exception can be justified only by reason of a State interest so strong as to permit a deviation from the requirement. Such a situation is not present in the instant case and no rationalization can make it so. The majority's actions cannot be justified on the ground that the members of plaintiff's class will ultimately receive notice and a hearing, for no court has ever adopted the general proposition that a wrong may be done simply because it can be undone.

I respectfully record my dissent.

/s/ Merhige  
United States District Judge

Date: July 17, 1972



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

Civil Action No. 537-71-R

JOHN R. DILLARD, ETC., PLAINTIFF

v.

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER,  
Chairman, Industrial Commission of Virginia, M. ED-  
WARD EVANS, THOMAS P. HARWOOD, JR., Commissioners  
of the Industrial Commission of Virginia, and AETNA  
CASUALTY AND SURETY COMPANY, DEFENDANTS

FINAL ORDER

For the reasons stated in the opinion of the Court this  
day filed,

It is ADJUDGED and ORDERED that the complaint  
and this action are dismissed.

Let the Clerk send copies of this order and the opin-  
ion to counsel of record.

/s/ [Illegible]  
United States Circuit Judge

/s/ [Illegible]  
United States Circuit Judge

/s/ [Illegible]  
United States District Judge

July 17, 1972.

## SUPREME COURT OF THE UNITED STATES

JOHN R. DILLARD, ETC.

v.

INDUSTRIAL COMMISSION OF VIRGINIA ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF VIRGINIA

No. 72-5411. Decided December 11, 1972

PER CURIAM.

Appellant brought a class action to challenge the constitutionality of a state regulation that permitted temporary suspension of his workmen's compensation payments without a prior hearing. He appealed an adverse judgment, but his jurisdictional statement states that after the decision below "an Order was entered by the Commission approving a lump-sum settlement of \$4,243.20 in full settlement of [his] individual claim for compensation for his injury which occurred on March 15, 1971."

In this state of the record, the motion to proceed *in forma pauperis* is granted, the judgment vacated and the case remanded to the United States District Court for the Eastern District of Virginia to consider whether this case is moot.



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

(Title omitted in printing)

MOTION TO INTERVENE AS PLAINTIFF

1. Willie Williams moves for leave to intervene as a plaintiff in this action in order to assert his claim under the complaint and motions heretofore filed by the plaintiff.

2. Applicant, Willie Williams, is a citizen of the United States, and a resident of Richmond, Virginia. He is the sole support of his wife and seven minor children. Applicant and his family's sole income is \$238.00 per month from Social Security benefits, and, prior to October 10, 1972, \$55.92 per week workmen's compensation benefits; and since the termination of said benefits, applicant has been working part-time.

3. Applicant on or about April 14, 1972 had an accident arising out of and in the course of his employment. The defendant, Industrial Commission of Virginia, approved an award of \$55.92 per week, during incapacity, beginning on April 15, 1972.

4. On or about October 10, 1972, The Travelers Insurance Company, which, upon information and belief, is an insurer with authorization to transact the business of workmen's compensation insurance in the State of Virginia, pursuant to Sections 65.1-103 *et. seq.* of the Code of Virginia, as amended, sent to Applicant a form stating that his benefits were being terminated on October 11, 1972. Said form was accompanied by an Agreed Statement of Fact form, which was supposed to be signed by the Applicant.

5. The Applicant did not sign the Agreed Statement of Fact form, but was not paid any compensation after October 10, 1972.

Upon information and belief, on or about October 13, 1972, the defendant, Industrial Commission of Virginia, reviewed the Application for hearing and made an *ex parte* determination that "probable cause exists to believe

that a change in condition has occurred", pursuant to Rule 13 of the Rules of the Industrial Commission of Virginia, as amended.

7. On or about December 2, 1972 the Applicant received a Notice of Hearing informing him that a hearing would be held on December 15, 1972, on the question of a change in his physical condition.

8. A hearing was held on December 15, 1972, at which evidence was presented, and further medical evidence was ordered by the Industrial Commission to be obtained.

9. Since October 10, 1972 the Applicant has received no workmen's compensation benefits.

10. The termination of Applicant's workmen's compensation benefits has caused and will continue to cause he and his family extreme and irreparable hardship, suffering and damage.

11. Applicant adopts the allegations in paragraphs numbered 1 through 2, 5 through 6 and 15, and prayers numbered 2 through 5 contained in the complaint filed by the plaintiff.

12. Applicant is a member of the class of persons represented by the plaintiff in this suit.

WHEREFORE, applicant moves pursuant to Rules 23 (d) and 24 of the Federal Rules of Civil Procedure for leave to intervene as a plaintiff in this action.

Respectfully submitted,

WILLIE WILLIAMS

By /s/ George S. Newman  
GEORGE S. NEWMAN,  
Counsel

NEIGHBORHOOD LEGAL AID SOCIETY, INC.  
P.O. Box 417  
Richmond, Virginia 23203

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

[Title Omitted in Printing]

PROPOSED COMPLAINT

1. This is an action for a preliminary and permanent injunction, and damages authorized by 42 U.S.C. § 1983 to redress the deprivation, under color of state law, statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured by the Constitution of the United States. The rights, privileges and immunities for which redress is sought are those secured by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. This is also an action for a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202, to declare the rights established by the aforementioned constitutional provision.

2. Jurisdiction is conferred on this Court by 28 U.S.C. § 1343 (3) and (4), providing for original jurisdiction of this Court in suits authorized by 42 U.S.C. § 1983; jurisdiction is further conferred on this Court by 28 U.S.C. §§ 2201 and 2202 relating to declaratory judgments, and by 28 U.S.C. §§ 2281 and 2284 providing for a three-judge district court.

3. Applicant, Willie Williams, is a citizen of the United States and a resident of Richmond, Virginia.

4. Applicant brings this action on his own behalf and on behalf of all other persons similarly situated pursuant to Rule 23 (a) (b) (2) of the Federal Rules of Civil Procedure. The class which applicant represents is all persons similarly situated who are or will be recipients of Workmen's Compensation pursuant to the Virginia Workmen's Compensation Act (Title 65, Code of Virginia, as amended) and who are or will be, therefore, subject to having their benefits terminated prior to a hearing before the Industrial Commission of Virginia. The members of the class on behalf of whom applicant sues are so numerous as to make joinder impracticable. There are

questions of law or fact common to all members of the class, since applicant challenges the validity of a rule or regulation which is alleged to be applied uniformly to all members of the class on grounds available to all members of the class; to wit, the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The claims of the applicant are typical of the claims of the members of the class. The applicant will fairly and adequately protect the interest of the members of the class.

5. Defendant Thomas M. Miller is the chairman of the Industrial Commission of Virginia. Defendants M. Edward Evans, and Thomas P. Harwood, Jr., are the other members of said Commission. The Defendant, Industrial Commission of Virginia, is empowered, under Section 65.1-18 of the Code of Virginia, as amended, to make rules for carrying out the purposes of the Virginia Workmen's Compensation Act, including the Rule herein complained of.

6. Applicant on or about April 14, 1972 had an accident arising out of and in the course of his employment. The defendant, Industrial Commission of Virginia, approved an award of \$55.92 per week, during incapacity, beginning on April 15, 1972.

7. On or about October 10, 1972, The Travelers Insurance Company, which, upon information and belief, is an insurer with authorization to transact the business of workmen's compensation insurance in the State of Virginia, pursuant to Sections 65.1-103 *et. seq.* of the Code of Virginia, as amended, sent to Applicant a form (a copy of which is attached as Exhibit A) stating that his benefits were being terminated on October 11, 1972. Said form was accompanied by an Agreed Statement of Fact form, which was supposed to be signed by the Applicant.

8. The Applicant did not sign the Agreed Statement of Fact form, but was not paid any compensation after October 10, 1972.

9. Upon information and belief, on or about October 13, 1972, the defendant, Industrial Commission of Virginia, reviewed the Application for hearing (Exhibit A) and made an *ex parte* determination that "probable cause

exists to believe that a change in condition has occurred", pursuant to Rule 13 of the Rules of the Industrial Commission of Virginia, as amended.

10. On or about December 2, 1972 the Applicant received a Notice of Hearing (a copy of which is attached as Exhibit B), informing him that a hearing would be held on December 15, 1972, on the question of a change in his physical condition.

11. A hearing was held on December 15, 1972, at which evidence was presented, and further medical evidence was ordered by the Industrial Commission to be obtained.

12. Since October 10, 1972 the Applicant has received no workmen's compensation benefits.

13. The termination of Applicant's workmen's compensation benefits has caused and will continue to cause he and his family extreme and irreparable hardship, suffering and damage.

14. Rule 13 of the Rules of the Industrial Commission of Virginia, as amended, violates applicant's, and the class he represents, rights to Due Process guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that said Rule allows workmen's compensation benefits to be discontinued on the grounds of a change in condition, without giving the injured worker notice and the opportunity of having a prior evidentiary hearing.

WHEREFORE, Applicant, on his own behalf, and on behalf of all others similarly situated, respectfully prays that this Court:

1. Assume jurisdiction of this cause, convene a three-judge district court to determine this controversy, and set this cause down for a hearing.

2. Issue an Order certifying that this is a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

3. Enter a declaratory judgment pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure, declaring that Rule 13 of the Rules of the Industrial Commission of Virginia, as amended, violates and is repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United

4. Enter a preliminary injunction hearing. determination of this matter, a function pending the final injunction, prohibiting restraint and thereafter, a permanent ants, their successors in office, ning and enjoining defend- agents and employees from allowing the termination of workmen's compensation ben- efits without notice and the opportunity for a prior evi- dentiary hearing.

5. Issue an Order directing the defendants to order the insurance carrier, The Travelers Insurance Company, to reinstate the applicant's workmen's compensation benefits retroactively to October 10, 1972, and to continue said benefits until a decision is reached in a due process hearing finding him ineligible for

6. Grant applicant his costs such benefits,  
or alternative relief as the C herein and any additional  
and appropriate. Court may deem to be just

Respectfully submitted,

AN /s/ Wi  
Willie Williams  
ILLIE WILLIAMS

/s/ GEORGE S. NEWMAN ILLIE WILLIAMS  
NEIGHBORHOOD LEGAL AI  
SOCIETY, INC. ID  
P.O. Box 417  
Richmond, Virginia 2320  
643-0218 03  
Counsel for Applicant  
By: George S. Newman

## VERIFICATION

WILLIE WILLIAMS, being duly sworn, deposes and says that he is the applicant in the above captioned matter and foregoing Proposed Corfor intervention in the above captioned matter and that the facts alleged therein are true to thimplaint and that the facts are true to the best of his knowledge and belief.

/s/ W  
Willie Williams  
VILLIE WILLIAMS

[Jurat and Certificate of Secretary Omitted in Printing]



# THE TRAVELERS

THE TRAVELERS INSURANCE COMPANY • THE TRAVELERS INDEMNITY COMPANY

CLAIM DEPARTMENT  
H. V. THORSHILL, MANAGER

RICHMOND OFFICE  
3610 West Broad Street  
Richmond, Virginia 23230  
Telephone: 353-9161

October 10, 1972

Willio Williams  
507 Patrick Avenue  
Richmond, Va. 23222

REVIEWED - PROBABLE CAUSE FOUND

B. Condring Name 10-13-72 Date

I.C.#: 246-369

B- 5124251

Assured: Richmond Cuano Co.

Re: Willio Williams

We have a report from your (employee) (doctor) stating you ~~discontinue~~ are able to, return to work, on ~~or 9/26/72~~ Oct. 9, 1972.

We are, therefore, suspending temporary disability benefits with the enclosed check paying compensation through 10-10-72 and requesting the Industrial Commission of Virginia to consider this letter as an application for a hearing should one become necessary.

Total compensation paid: \$ 1,429.96 at the rate of \$ 55.92 from 1-15-72 to 10-11-72.

Please sign and return the attached Agreed Statement of Fact form acknowledging the termination of your temporary disability and of our payments to date.

The attached form is not a release. Signing it does not terminate your claim. You have twelve months from the last day for which compensation is paid pursuant to an award to make application to the Industrial Commission for payment of additional benefits.

Very truly yours,

CC: Industrial Commission of Virginia  
Post Office Box 1794  
Richmond, Virginia 23214

Subscribed and sworn to by Elyabeth

Anna S. Miller N/P

10/10/72 Date

NOTICE: HARTFORD, CONNECTICUT

Mr. Comm Exp 10-5K-72

EXHIBIT A

<u>Elyabeth S. Miller</u> Supervisor for <u>Richmond</u>
Date of last payment <u>10-10-72</u>
Reopen as of _____
Application <u>10-10-72</u> Referred to Docket <u>10-13-72</u>
By <u>tc</u>

COMMONWEALTH OF VIRGINIA



(Refer to I.C. File No. in all correspondence about this injury.)

I.C. FILE NO.

246-389

CARRIER'S NO.

DEPARTMENT OF WORKMEN'S COMPENSATION  
INDUSTRIAL COMMISSION OF VIRGINIA

P. O. BOX 1794 RICHMOND, VIRGINIA 23214

NOTICE OF HEARING

DATE OF ACCIDENT  
April 14, 1972

RE: Willie Williams  
V.  
Richmond Cuono Company

TO THE PARTIES ADDRESSED:

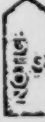
A hearing will be held at:

Industrial Commission Courtroom  
Planton Building - 3rd Floor  
Bank and Governor Streets  
Richmond, Virginia

on Monday, May 14, 1972 at 9:30 A. M.

SUBJECT OF HEARING: Insurer's  
letter dated October 10, 1972  
requesting a hearing on the  
ground of change in condition.

This hearing is part of a schedule. Postponement will cause inconvenience and extra expense. Continuance is entirely within the discretion of the Commission except as otherwise provided by law.



All medical reports are to be submitted to this Commission so they can be placed in the file prior to the date of hearing. Medical reports are acceptable in lieu of physicians personal appearances.

The parties must arrange to have all witnesses present to testify at the time and place designated. Failure of any party to appear at the time and place herein prescribed will result in action by the Commission as provided by law.

K. S. WILLIAMS, Deputy Commissioner  
INDUSTRIAL COMMISSION OF VIRGINIA

770-4472

Helen G. Cooper  
Secretary of Commission

Claimant

Mr. Willie Williams  
507 Patrick Avenue  
Richmond, Virginia 23222

Employer

Richmond Cuono Company  
9 South Fifth Street  
Richmond, Virginia 23219

Insurance Carrier

Travelers Insurance Company  
3610 West Broad Street  
P. O. Box 26426  
Richmond, Virginia 23261

Claimant's Counsel

George Newman, Esq.  
Neighborhood Legal Aid Society  
10 South Tenth Street  
Richmond, Virginia 23219

Defendant's Counsel

Date of this Notice: 12-1-72

EXHIBIT B



37  
95

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

[Title Omitted in Printing]

STATEMENT OF DEFENDANT INDUSTRIAL COMMISSION IN  
OPPOSITION TO PETITION FOR INTERVENTION

Now comes the defendant Industrial Commission of Virginia, by counsel, and in opposition to the petition for leave to intervene filed herein by Willie Williams says as follows:

1) Applicant has contended that the named plaintiff, Dillard, no longer represents the purported class because his claim has been settled. Applicant's Memorandum In Support of Intervention at 3. If this be true, defendant submits that applicant is no more a proper party or proper class representative than the plaintiff, since applicant has also received settlement of his claim. See Exhibits A and B attached hereto. Consequently, it seems unnecessary to add an additional party plaintiff where resolution of the same issues will be litigated by the original plaintiff who, if he does represent a class, adequately represents the interests of the applicant. (It may be noted that plaintiff's attorney and applicant's attorney are members of the same firm. This may explain why applicant's certificates of service do not indicate that counsel for plaintiff has received notice of his application.)

2) Applicant has failed to join the Travelers Insurance Company in his proposed Complaint. Said company is a necessary party to the relief sought by applicant, since the payments which the applicant sought to have resumed were terminated by the company, not by defendant.

3) As for applicant's complaint that his insurance carrier (Travelers) failed to comply with defendant's Rule 13 requiring it to pay benefits up to the date of filing as defined by the said rule, such matters are properly within the ambit of enforcement by the Industrial Com-

mission against the carrier rather than by this Court against the Commission.

Defendant Commission respectfully submits, therefore, that the application for intervention should be denied.

INDUSTRIAL COMMISSION OF  
VIRGINIA

By: /s/ Vann H. Lefcoe

Andrew P. Miller  
Attorney General  
Vann H. Lefcoe  
Assistant Attorney General  
Supreme Court Building  
Richmond, Virginia 23219

[Certificate of Service Omitted in Printing]

## EXHIBIT A

## THURMOND, BEAVER &amp; BOSTWICK

ATTORNEYS AT LAW

Suite 495, Seaboard Bldg.  
3600 W. Broad St.  
Richmond, Virginia 23230

Lanier Thurmond  
Robert P. Beaver  
Edgar I. Bostwick

Telephone  
Area Code 703  
355-5731

February 7, 1973

George S. Newman, Esquire  
Neighborhood Legal Aid Society, Inc.  
10 South 10th Street  
Richmond, Virginia 23219

I. C. No. 246-389

Re: Willie Williams vs. Richmond Guano Company  
Our File No. T72-692

Dear Mr. Newman:

Enclosed are drafts covering the total disability period from October 11, 1972 to January 18, 1973, which is the date of Dr. Herman Nachman's report and the date to which we agreed to pay total disability. Also enclosed is a check paying partial disability benefits from January 10, 1973 to February 8, 1973. The partial disability benefits will be continued so long as Mr. Williams qualifies under the terms of the Virginia Workmen's Compensation Act.

These drafts are submitted with the understanding that your client will execute the agreed statement of facts in the space provided. This should be returned so that it can be submitted to the Industrial Commission to bring the matter up to date. Please see that Mr. Williams' signature is witnessed. This form should be returned to me.

These drafts and the agreed statement of facts and supplemental agreement are in accordance with the agreement you and I had to bring this matter to a conclusion.

If, for any reason, you have any questions on this matter, please be good enough to call me.

Very truly yours,

/s/ Edgar I. Bostwick  
EDGAR I. BOSTWICK

EIB:kh

Enclosures

cc: Commissioner Thomas M. Miller

cc: Mr. J. J. Boehling, Jr.

## EXHIBIT B

## THURMOND, BEAVER &amp; BOSTWICK

## ATTORNEYS AT LAW

Suite 495, Seaboard Bldg.  
3600 W. Broad St.  
Richmond, Virginia 23230

Lanier Thurmond  
Robert P. Beaver  
Edgar I. Bostwick

Telephone  
Area Code 703  
355-5731

February 1, 1973

Mr. J. J. Boehling, Jr.  
Supervisor, Claim Department  
Travelers Insurance Company  
3610 West Broad Street  
Richmond, Virginia 23230

Re: Willie Williams vs. Richmond Guano Company  
146 CB 5124252  
Attorney's File No. T72-692

Dear Joe:

Mr. George S. Newman, Attorney, and myself have agreed on a disposition of this case, and under the agreement, the Travelers is to pay total disability benefits to January 18, 1973, which is the date of Dr. Herman Nachman's report of examination.

After that, it is agreed that partial disability benefits will be paid within the statutory limits or until the claimant is physically able to resume full employment.

Under the evidence presented at the hearing, he stated that his average wage at the present time was \$65.00 per week, and at the time he was employed by the Richmond Guano Company, his average wage was \$93.20 per week, which makes a difference of \$28.20, so that he would be due \$16.92 per week under partial disability benefits.

It appears that it would expedite the matter if you would send the necessary agreements to Mr. Newman so that can be executed and submitted to the Commission and payments can be made accordingly.

Sincerely yours,

/s/ Edgar I. Bostwick  
EDGAR I. BOSTWICK

EIB:kh

cc: George S. Newman, Esquire

cc: Commissioner K. S. Wilhoit

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

[Title Omitted in Printing]

SUPPLEMENT TO DEFENDANTS' STATEMENT  
IN OPPOSITION TO INTERVENTION

Now comes the defendant Industrial Commission of Virginia, by counsel, and asks that the Agreed Statement of Facts and Supplemental Memorandum of Agreement filed herewith be made Exhibit C to their Statement In Opposition hereinbefore filed.

INDUSTRIAL COMMISSION OF  
VIRGINIA, et als.

By: /s/ Vann H. Lefcoe  
Counsel

Vann H. Lefcoe  
Assistant Attorney General  
Supreme Court Building  
Richmond, Virginia 23219

[Certificate of Service Omitted in Printing]



COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF WORKMEN'S COMPENSATION  
INDUSTRIAL COMMISSION OF VIRGINIA  
P. O. Box 1794  
Richmond, Virginia 23214

WILLIE WILLIAMS, EMPLOYEE  
and  
RICHMOND GUANO COMPANY, EMPLOYER

Claim Number 146 CB 5124251  
246-389

Date of Accident 4-14-72

AGREED STATEMENT OF FACT

It is agreed that the employee (returned to work) on January 18, 1973, at an average weekly wage of \$65.00. The outstanding award is terminated on the above date subject to approval by the Industrial Commission. The employee may reopen the claim pursuant to § 65.1-99. SEE NOTE BELOW

Date of Agreement 2/12/73

TRAVELERS INS. Co.  
Employer or Insurer

By: /s/ [Illegible]

/s/ Willie Williams  
Employee

/s/ GEORGE S. NEWMAN  
Witness to Employee's Signature

Total compensation paid \$2220.84 at \$52.92 per week from 4-15-72 through 1-17-73. Medical Expense \$ .....

NOTE: The signing of the above agreement is not a requirement for payment. This agreement is neither a receipt for money nor a release of claim. Should further disability result, the claim can be reopened by written application received by the Industrial Commission within twelve months from the late date for which compensation was paid; however, at a hearing on the application, compensation cannot begin more than 14 days prior to the date of filing.

#### SUPPLEMENTAL MEMORANDUM OF AGREEMENT

It is agreed that on January 18, 1973, the employee \_\_\_\_\_ OR had a change in average weekly wage of \$93.20 to \$65.00.

It is further agreed that compensation will be paid and accepted beginning January 18, 1973, at the rate of \$16.92 per week to continue for so long as partially disabled. (Specify number of weeks during disability)

Date of Agreement 2/12/73

TRAVELERS INS. CO.  
Employer or Insurer

By: /s/ [Illegible]

/s/ Willie Williams  
Employee

/s/ George S. Newman  
Witness to Employee's Signature

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

[Filed, Mar. 14, 1973, Clerk,

U. S. Dist. Court, Richmond, Va.]  
Civil Action No. 537-71-R

JOHN R. DILLARD, individually, and on behalf of all  
other persons similarly situated, COMPLAINANT

and

WILLIE WILLIAMS, individually, and on behalf of  
all other persons similarly situated,  
APPLICANT FOR INTERVENTION,

v.

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER,  
Chairman, Industrial Commission of Virginia, M. ED-  
WARD EVANS, THOMAS P. HARWOOD, JR., Commissioners  
of the Industrial Commission of Virginia, DEFENDANTS

ORDER

Upon motion of the defendant Thomas P. Harwood, Jr., for good cause shown, it is hereby ORDERED that the said Thomas P. Harwood, Jr., be dismissed as a party defendant and that Robert P. Joyner, his successor in office, be made a party defendant hereto.

Date: Mar. 14, 1973

/s/ [Illegible]  
United States District Judge

No. C/A 537-71-R

DILLARD

v.

INDUSTRIAL COMMISSION OF VIRGINIA

## PER CURIAM:

This matter is presently before the Court pursuant to the mandate of the Supreme Court of the United States directing the Court to consider whether this cause has been rendered moot by reason of the fact that the originally named plaintiff, Dillard, had, approved by order of the defendant, Industrial Commission of Virginia, entered into a lump sum settlement of his individual claim for workmen's compensation. The respective parties have briefed the issue and the Court has entertained oral argument.

While the usual rule is that an actual controversy must exist at all stages of appellate review, see *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), we deal in this instance with a class action wherein the named plaintiff has been found to be an adequate representative of the named class. There can be no doubt that the justiciable issue herein is capable of repetition. See *Rowe v. Wade* 41 LW 4213, 4217, January 22, 1973. In addition, one Willie Williams, individually and on behalf of all other persons similarly situated, has moved the Court for leave to intervene as a party plaintiff, which intervention will be permitted, and his proposed complaint will be ordered filed. At the bar of the Court, the defendant Industrial Commission of Virginia and Williams by their respective counsel have stipulated that the issues involved between the intervening plaintiff and defendant Industrial Commission are identical to those issues ruled upon by this Court in its order of July 17, 1972 and all parties have agreed to rest their case on the pleadings and briefs which the Court considered in rendering its opinion of July 17, 1973.

Concluding this action is not moot, an appropriate order will enter.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

[Filed, Jun. 26, 1973, Clerk,  
U. S. Dist. Court, Richmond, Va.]

Civil Action No. 537-71-R

JOHN R. DILLARD, ind., etc.

v.

INDUSTRIAL COMMISSION OF VIRGINIA, ET AL

ORDER

For the reasons assigned in the memorandum this day filed, and deeming it proper so to do, it is ADJUDGED and ORDERED:

1. The motion of Willie Williams to intervene herein as a party plaintiff be, and the same is hereby, granted; his proposed complaint be, and the same is hereby filed, and the answer of the defendant Industrial Commission of Virginia filed to the original complaint be, and the same is hereby considered where appropriate as its answer to the complaint of the intervenor.

2. This action is declared a class action and the named plaintiff is representative of the class affected.

3. This cause is not moot and the court's majority opinion and dissenting opinion of July 17, 1972 and its order of the same day be, and the same are hereby, re-instated, effective this date.

Let the Clerk send copies of this order and the memorandum to counsel of record.

/s/ [Illegible]  
United States Circuit Judge

/s/ [Illegible]  
United States District Judge

/s/ [Illegible]  
United States District Judge

Date: June 26, 1973

## SUPREME COURT OF THE UNITED STATES

No. 73-5412

JOHN R. DILLARD and WILLIE WILLIAMS, etc.,  
APPELLANTS,

v.

INDUSTRIAL COMMISSION OF VIRGINIA, ET AL.

ON CONSIDERATION of the motion of the appellants  
for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion  
be, and the same is hereby, granted.

December 17, 1973

## SUPREME COURT OF THE UNITED STATES

No. 73-5412

JOHN R. DILLARD and WILLIE WILLIAMS, etc.,  
APPELLANTS,

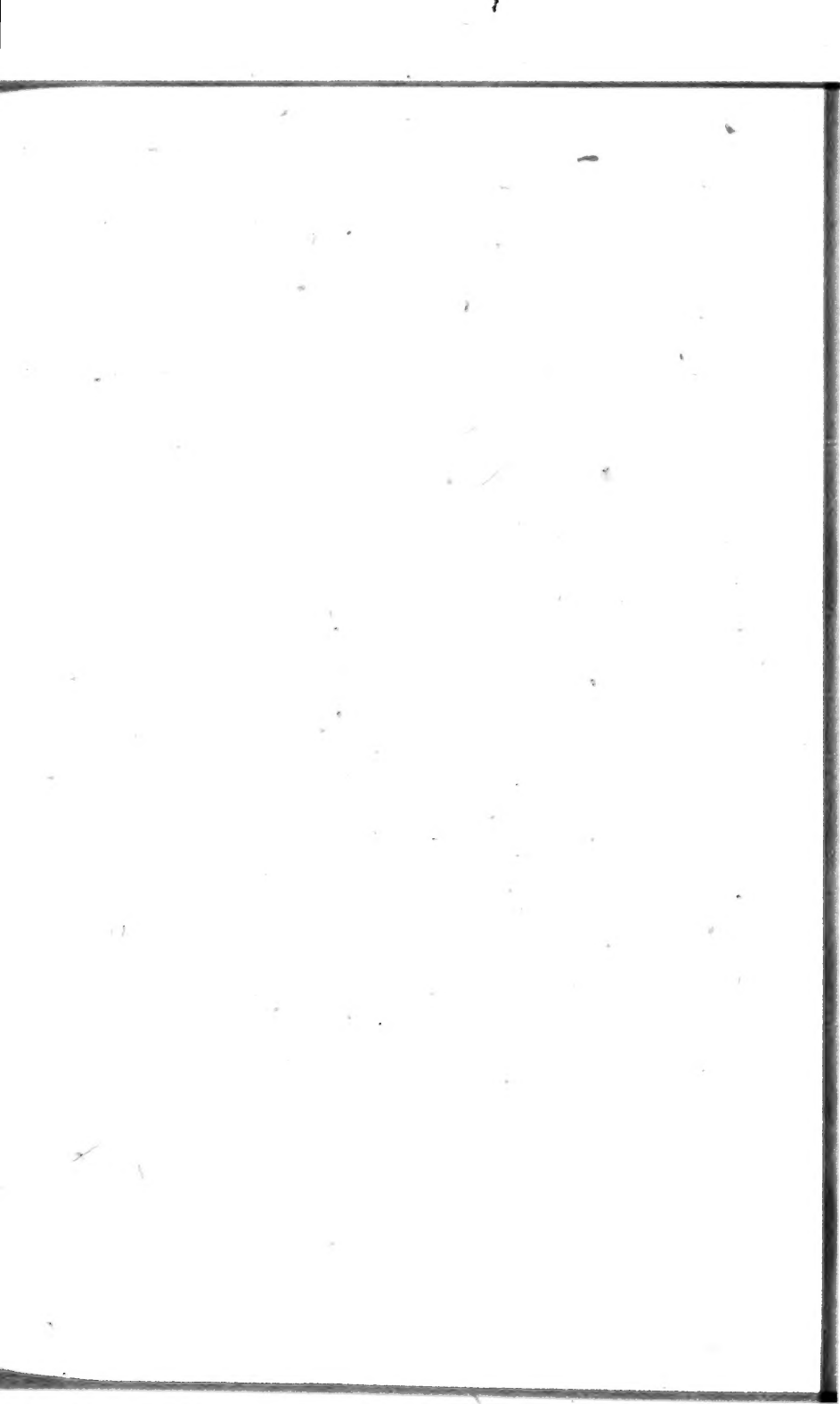
v.

INDUSTRIAL COMMISSION OF VIRGINIA, ET AL.

APPEAL from the United States District Court for  
the Eastern District of the Commonwealth of Virginia.

The statement of jurisdiction in this case having been  
submitted and considered by the Court, probable juris-  
diction is noted and the case is set for oral argument.

December 17, 1973





LIBRARY  
SUPREME COURT

Supreme Court, U. S.  
FILED

OCT 9 1973

MICHAEL STUBBS, JR. FILE

In The  
**Supreme Court of the United States**  
October Term, 1973

No. 73-5412

JOHN R. DILLARD, ETC.,

*Appellants,*

v.

INDUSTRIAL COMMISSION OF  
VIRGINIA, Et AL.,

*Appellee.*

MOTION TO AFFIRM

ANDREW P. MILLER  
*Attorney General*

VANN H. LEFCOE  
*Assistant Attorney General*

Supreme Court Building  
Richmond, Virginia 23219

WILLARD I. WALKER  
McGuire, Woods & Battle  
1400 Ross Building  
Richmond, Virginia 23219

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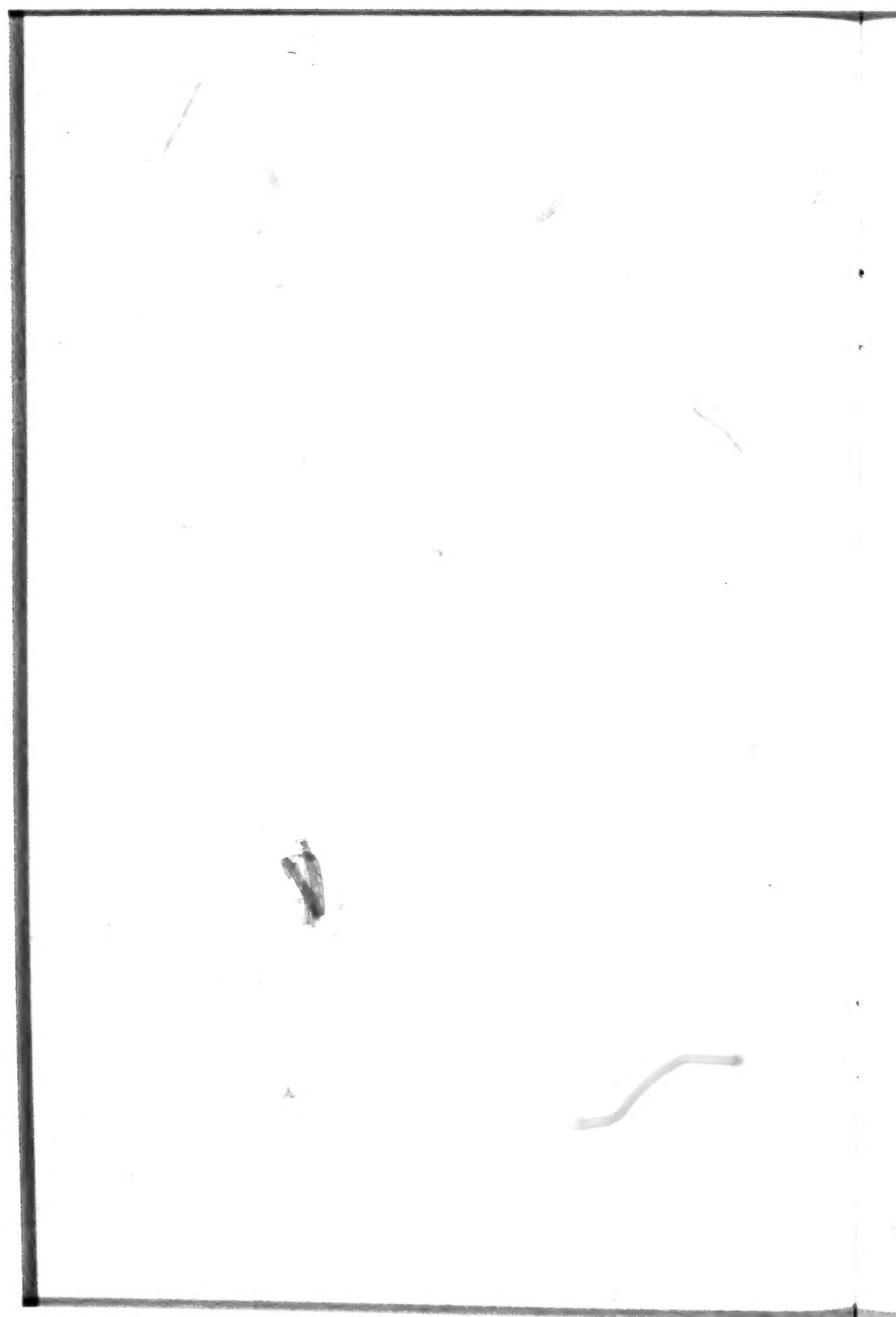
## TABLE OF CITATION

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In The  
**Supreme Court of the United States**

October Term, 1973

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No. 73-5412

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JOHN R. DLLARD, ETC.,

*Appellant,*

v.

INDUSTRIAL COMMISSION OF  
VIRGINIA, ET AL.,

*Appellee.*

---

**MOTION TO AFFIRM**

---

Appellees Industrial Commission of Virginia, et al., pursuant to Rule 16 of this Court, move that the final order and decree of the three-judge District Court for the Eastern District of Virginia herein appealed from be affirmed on the ground that the judgment of the court below is plainly right and the question does not require further argument.

## ARGUMENT

This case involves a challenge to the constitutionality of Virginia's workmen's compensation laws insofar as those laws permit the termination of the benefits by an employer or insurer, on the ground of a change in the condition of the employee, prior to a full hearing by the Industrial Commission of Virginia on the merits of the application for termination. Specifically challenged is Rule 13 of the defendant Commission, promulgated in accordance with § 65.1-18 of the Code of Virginia (1950), as amended, which reads as follows:

"Applications for Review of on Ground of Change in Condition.—Applications for review under § 65.1-99 of the Act must be in writing and state the ground relied upon for relief. Reviews of awards on the ground of a change in condition shall be determined as of the date of the filing of the application in the offices of the Commission, except as provided in paragraphs two and three hereof.

"All applications for hearing by an employer or insurer under § 65.1-99 shall show the date through which compensation benefits have been paid. No application shall be considered by the Commission until all compensation under the outstanding award has been paid to the date such application is filed with the Commission. Except, that in any case in which the employee has actually returned to work or has refused employment (§ 65.1-63), medical attention (§ 65.1-88), or medical examination (§ 65.1-91), compensation may be terminated as of the date the employee returned to work or refused employment, medical attention or medical examination, or as of a date fourteen days prior to the date the application is filed, whichever is later. In such cases the application will be considered and determined as of the date of return to work, or refusal, or as of a date fourteen days prior to

the date the application is filed, whichever is later. *All applications by an employer or insurer shall be under oath and shall not be deemed filed and benefits shall not be suspended until the supporting evidence which constitutes a legal basis for changing the existing award shall have been reviewed by the Commission, or such of its employees as may be designated for that purpose, and a determination made that probable cause exists to believe that a change in condition has occurred.*

"All applications for hearing by an employee on the ground of further work incapacity shall be considered and determined as of the date incapacity for work actually begins, or as of a date fourteen days prior to the date the application is filed, whichever is later." (Emphasis supplied.)

The italicized language represents the text of an amendment to the Rule which became effective April 1, 1972. The effect of this amendment is to require the employer or insurer who wishes to suspend the payment of benefits pending a full hearing on the application to submit sufficient information to the Commission of the ultimate merit of the suspension that the possibility of fraudulent, frivolous or arbitrary suspensions is eliminated and the likelihood of suspension in non-fraudulent but otherwise non-meritorious cases is minimized. It is appellees' position that this procedure provides adequate due process protection to both employer and employee, to the extent any such protection is required in workmen's compensation law, and that no other procedure short of the full hearing itself can practically provide this protection.

In essence, the relief sought by appellants is that Rule 13, rather than being declared void and unenforceable, be extended to require the continuation of benefits up to the time of the hearing (and presumably the determination) on

the employer's application. It will be seen that in the absence of Rule 13 there would be nothing to prevent the employer or insurer from unilaterally cutting off at any time. *Manchester Board & Paper Co., Inc. v. Parker*, 201 Va. 328, 111 S.E.2d 453 (1959).

It is true, as appellants point out, that the limits of procedural due process must be ascertained by balancing the possible "grievous loss" to the individual against the governmental interest in summary adjudication, and that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Goldberg v. Kelly*, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018 (1970), citing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S.Ct. 624 (1951) and *Cafeteria & Restaurant Workers Union, etc. v. McElroy*, 367 U.S. 886, 81 S.Ct. 1743 (1961). It is not true, however, that the governmental interest in pre-hearing termination is that of saving time and administrative expense, nor is it true that the individuals whose payments may become temporarily terminated suffer the kind of "grievous loss" that would tip the balance in appellant's favor.

It will be quickly seen that the State has no interest at all in being able to summarily suspend benefits, because the State does not pay the benefits so it has none to suspend, summarily or otherwise. It is the *employer* who wants to suspend the benefits, not the State. This being so, it immediately follows that the State has no need to expend additional administrative resources to hold prior hearings, since it could simply choose to require the employer to continue payments up to the final adjudication if necessary. Secondly,

although this requirement would result in higher expenses to the employer and in return higher prices to the public, the maintenance of persons on workmen's compensation for longer than necessary might mean less unemployment and welfare payments which in turn means lower taxes to the public, so any alleged State interest in that regard is illusory. In any event, these are not the State's interests in the workmen's compensation plan.

To properly recognize the governmental interest involved here, it must be clearly understood that the funds being administered are not public funds but private funds representing payments made under a system provided by the State as a substitute for common-law tort litigation. Since the State has provided its citizens with this substitute for private litigation, it has a duty to *both* parties to see that they receive a fair shake. Indeed, at first glance it would seem that the employer-citizen is more entitled to due process than the employee-citizen. After all, workmen's compensation is voluntary only for the employee, not for the employer. §§ 65.1-103 et seq. The employer has no recourse against the employee for benefits wrongfully paid, § 65.1-99, while the employee can not only recover all benefits wrongfully suspended but can reduce his award to judgment and compel the resumption of benefits. § 65.1-100. See *Parrigen v. Long*, 145 Va. 637, 134 S.E. 562 (1926). Against these considerations, it does not seem at all inequitable to permit the employer to minimize unnecessary losses by pre-hearing termination where it appears likely that the application is made in good faith and based on substantial evidence. It should be noted at this point that in the other cases where pre-hearing termination is attempted, such as Social Security, unemployment, and welfare, the government is not only the "judge" of the rights of the



parties, it is also in fact one of the parties—the administrative “defendant” out of whose pocket the payments are made. Because no public funds are involved in workmen’s compensation, however, this possibility of partiality of the “judge” toward one of the parties does not exist, and indeed it should be presumed that the Industrial Commission is entirely impartial as between the interests of the employers and the employees.

Examining now the private interest of the employee in avoiding pre-hearing termination—the claimed “brutal need”—it will be seen that there are significant differences between the needs of an individual receiving workmen’s compensation, as here, and the needs of an individual receiving welfare payments as in *Goldberg v. Kelly*, *supra*. While it is true that the eligible worker is by definition unable to earn his usual wages because of some injury or disease, it is *not* true that he is also by definition destitute, as is a welfare recipient. The crucial factor, said this Court in *Goldberg*, is that pre-hearing termination “may deprive an eligible recipient of the very means by which to live while he waits.” 397 U.S. at 264, 90 S.Ct. at 1018. Workmen’s compensation recipients, by definition, have been employed prior to their illness or injury, while welfare recipients are, by definition, unemployed and perhaps unemployable. It is not unreasonable to assume that workmen’s compensation recipients have savings or other independent resources, which welfare recipients are not likely to have, to tide them over the average one-month period between application and completion of review. It must not be forgotten that absolute termination without recourse is not being suggested here. What is in issue is the *temporary* suspension of benefits, with a full right of recovery, balanced against the employer’s (and insurer’s) interest in avoiding the loss of thou-

sands of dollars per week in undeserved payments for which there is no right of recovery. In striking this balance, defendants submit that this Court's recent affirmance of *Torres v. New York State Department of Labor*, 321 F.Supp. 432 (S.D. N.Y. 1971) *aff'd*, 405 U.S. 949 (1972) is significant. There the Court clearly rejected the minority argument based on *Goldberg v. Kelly*, and upheld the lower court's distinguishing of *Goldberg* from unemployment compensation cases, where, as here,<sup>9</sup>

"... the worse possible effect of the procedure which plaintiffs attack as being lacking in due process would be that for a period of a few weeks until a hearing is held a claimant who is finally determined to be eligible for payments would have to live on his accumulated havings or, if he had no savings, would have to resort to relief. If he is eventually found to be eligible he will receive retroactively all the payments to which he was entitled." *Torres v. N. Y. State Dept. of Labor*, 321 F. Supp. at 437.

The important consideration, which has apparently been recognized by this Court, is that persons who are likely to have independent resources do not stand on the same footing with welfare recipients when it comes to cutting off government benefits, let alone private compensation for tort injury.

Appellees submit that the "probable cause" prehearing determination provided for in Rule 13 as amended is therefore adequate to satisfy any requirement of due process based on a balancing of the various interests described above. This procedure, as stated, insures that an impartial reviewer will check each application to see that it is not fraudulent, frivolous, or otherwise unfounded. It cannot be said that the *ex parte* determination envisaged by the

Rule will result in unfair treatment of employees because the employer will always be able to substantiate his claim with some evidence. On the contrary, since there is still no evidence of what the Commission will require by way of substantiating evidence, it should be presumed that the Commission not only act fairly but will recognize the economic strength of the employer or insurer as opposed to that of the employee in scrutinizing such evidence. These are matters that it will take evidence of the Commission's actual practice to decide, which the plaintiffs have made no attempt to adduce in the year since this case was last before this Court. As the court below found,

“Nowhere does the Rule say the determination may be made without notice to the employee and a chance to be heard. The mere fact that such an inference may exist—a determination without notice to the employee and an opportunity to be heard—does not render the language objectionable on its face. *Lindsey v. Normet*, 405 U.S. 56, 65. The amendment to the Rule is new and the evidence does not indicate what the Commission will require in the way of supporting evidence to constitute a legal basis for establishing probable cause to believe a change in condition has occurred.” Memo opinion, pp. 8-9.

## CONCLUSION

From the foregoing it is clear that the judgment of the District Court that under the facts and circumstances here involved the State function does not constitute a denial of due process is plainly right, based on the law and evidence, and hence this Motion to Affirm that judgment should be granted without further argument.

INDUSTRIAL COMMISSION OF VIRGINIA  
THOMAS M. MILLER  
M. EDWARD EVANS  
THOMAS P. HARWOOD, JR.

By: VANN H. LEFCOE  
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AETNA CASUALTY AND SURETY COMPANY  
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**CERTIFICATE OF SERVICE**

I, Vann H. Lefcoe, a member of the Bar of the Supreme Court of the United States and counsel for the above named appellees, hereby certify that I have served three copies of the foregoing Motion to Affirm on John M. Levy, Esquire, 10 South Tenth Street, Richmond, Virginia 23219 and George S. Newman, Esquire, P.O. Box 417, Richmond, Virginia 23203, on or before October 10, 1973. All parties required to be served have been served.

VANN H. LEFCOE



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Supreme Court, U. S.  
FILED

FEB 1 1974

MICHAEL RODAK, JR., CL

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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No. 73-5412

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JOHN R. DILLARD and WILLIE WILLIAMS,  
individually, and on behalf of all other  
persons similarly situated,

*Appellants,*

v.

INDUSTRIAL COMMISSION OF VIRGINIA,  
THOMAS M. MILLER, Chairman, Industrial  
Commission of Virginia, M. EDWARD EVANS,  
ROBERT P. JOYNER, Commissioners of the  
Industrial Commission of Virginia, and AETNA  
CASUALTY AND SURETY COMPANY,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE EASTERN DISTRICT OF VIRGINIA

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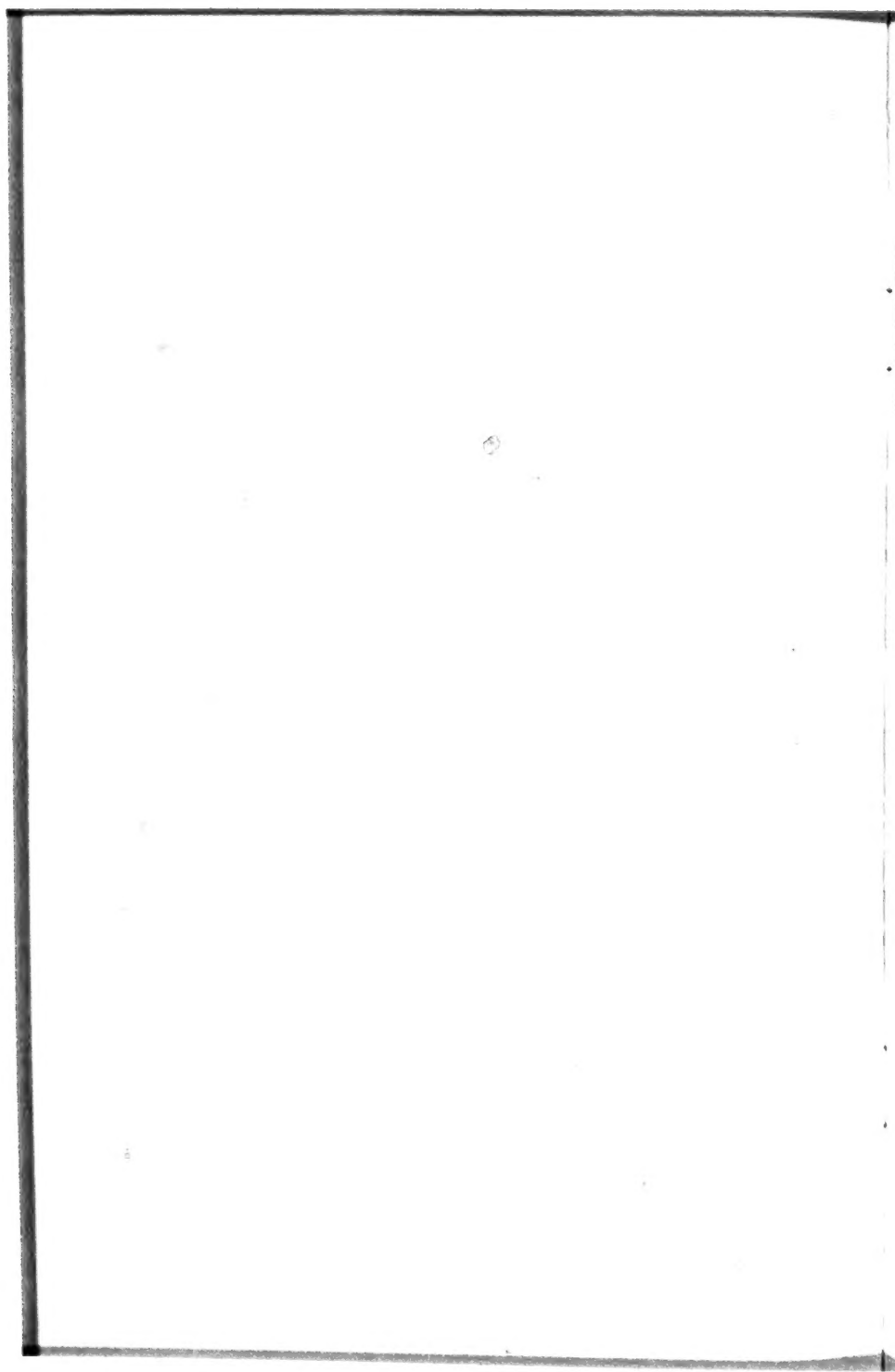
BRIEF FOR THE APPELLANTS

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*Counsel for Appellants*

January 31, 1974





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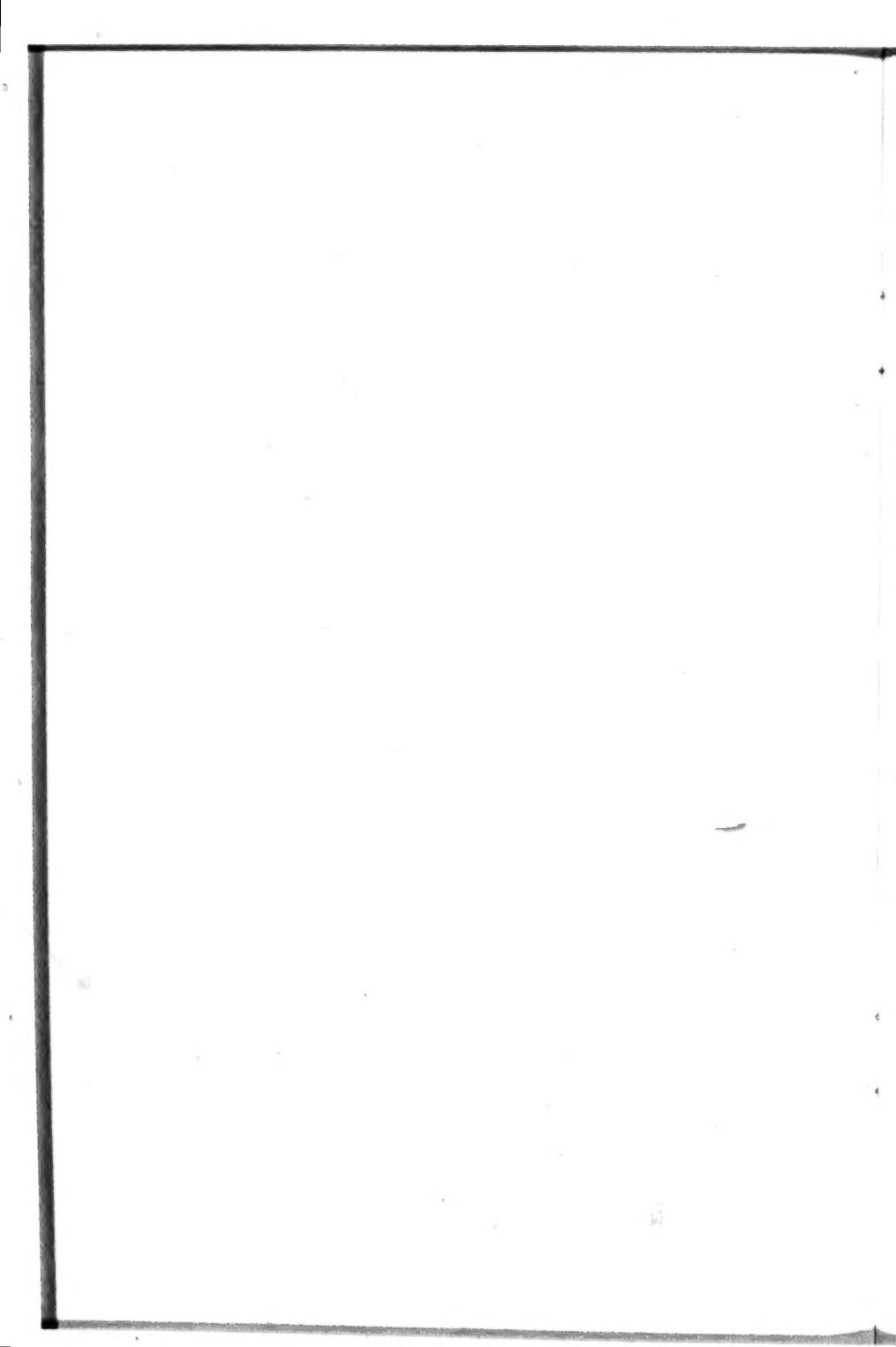
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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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No. 73-5412

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JOHN R. DILLARD and WILLIE WILLIAMS,  
individually, and on behalf of all other  
persons similarly situated,

*Appellants,*

v.

INDUSTRIAL COMMISSION OF VIRGINIA,  
THOMAS M. MILLER, Chairman, Industrial  
Commission of Virginia, M. EDWARD EVANS,  
ROBERT P. JOYNER, Commissioners of the  
Industrial Commission of Virginia, and AETNA  
CASUALTY AND SURETY COMPANY,

*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE EASTERN DISTRICT OF VIRGINIA

---

**BRIEF FOR THE APPELLANTS**

---

**OPINION BELOW**

The opinion of the three-judge District Court for the Eastern District of Virginia of July 17, 1972 (App. 46-65), which has been reinstated, is reported at 347 F.Supp. 71.

## JURISDICTION

The judgment of the District Court was entered on June 26, 1973. (App. 87) The Notice of Appeal was filed in the District Court on July 26, 1973. The Jurisdictional Statement was filed on September 10, 1973, and probable jurisdiction was noted on December 17, 1973. The jurisdiction of this Court rests on 28 U.S.C. §§ 1253 and 2101(b).

## QUESTION PRESENTED

Whether, under the workmen's compensation scheme in the State of Virginia, the discontinuance of workmen's compensation benefits to injured workers without notice and the opportunity for a prior evidentiary hearing, violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

## STATUTES INVOLVED

### I.

Amendment XIV, Section 1, Constitution of the United States:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are Citizens of the United States and of the state wherein they reside . . . nor shall any state deprive any person of life, liberty or property, without due process of law . . .

### II.

Section 65.1-99, Code of Virginia of 1950, as amended:



§65.1-99. Review of award on change in condition. Upon its own motion or upon the application of any party in interest, on the ground of a change in condition, the Industrial Commission may review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Act, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such award shall be made after twelve months from the last date for which compensation was paid, pursuant to an award under this Act, except thirty-six months from the last day for which compensation was paid shall be allowed for the filing of claims payable under §65.1-56.

### III.

Rule 13 of the Rules of the Industrial Commission of Virginia, as amended on April 1, 1972:

**Applications for Review on Ground of Change in Condition.**—Applications for review under §65.1-99 of the Act must be in writing and state the ground relied upon for relief. Reviews of awards on the ground of a change in condition shall be determined as of the date of the filing of the application in the offices of the Commission, except as provided in paragraphs two and three hereof.

All applications for hearing by an employer or insurer under §65.1-99 shall show the date through which compensation benefits have been paid. No applications shall be considered by the Commission until all compensation under the outstanding award has been paid to the date such application is filed with the Commission. Except, that in any case in which the employee has actually returned to work

or has refused employment (§65.1-63), medical attention (§65.1-88), or medical examination (§65.1-91), compensation may be terminated as of the date the employee returned to work or refused employment, medical attention or medical examination, or as of a date fourteen days prior to the date the application is filed, whichever is later. In such cases the application will be considered and determined as of the date of return to work, or refusal, or as of a date fourteen days prior to the date the application is filed, whichever is later. All applications by an employer or insurer shall be under oath and shall not be deemed filed and benefits shall not be suspended until the supporting evidence which constitutes a legal basis for changing the existing award shall have been reviewed by the Commission, or such of its employees as may be designated for that purpose, and a determination made that probable cause exists to believe that a change in condition has occurred.

All applications for hearing by an employee on the ground of further work incapacity shall be considered and determined as of the date incapacity for work actually begins, or as of a date fourteen days prior to the date the application is filed, whichever is later.

## STATEMENT

### A. John R. Dillard

On March 15, 1971 appellant Dillard was injured on his job. (App. 12). Appellee Industrial Commission of Virginia (hereinafter referred to as the Commission), on April 7, 1971, approved an agreement appellant had entered into with his employer and appellee Aetna Casualty and Surety Company (hereinafter referred to as

Aetna) for the payment of workmen's compensation in the amount of \$40.80 per week. (App. 11) On June 3, 1971, Mr. Dillard's \$40.80 per week compensation was discontinued upon Aetna's filing an Application for Hearing pursuant to Section 65.1-99, Code of Virginia of 1950, as amended, and Rule 13 of the Rules of the Commission. (App. 12) Aetna alleged in its Application for Hearing that Mr. Dillard's condition had changed and that he was no longer disabled. The hearing was held on July 16, 1971, and the decision by the Commission on August 25, 1971, found him still unable to work and directed that compensation be resumed. (App. 13-16)

On September 16, 1971 Aetna filed for another hearing alleging that Mr. Dillard had refused medical treatment, and again his compensation was discontinued. (App. 17) This suit was filed on October 19, 1971, and Mr. Dillard's compensation was again resumed.

On March 21, 1972 the Commission amended Rule 13 to require an *ex parte* determination by it "that probable cause exists to believe that a change of condition has occurred" before it would allow benefits to be suspended pending a hearing. (App. 44-45)

On July 17, 1972 the three-judge district court found that, in the context of workmen's compensation benefits, due process was sufficiently satisfied if there was "at some stage an opportunity for a hearing," (App. 55) and dismissed appellant's action, Merhige, J. dissenting. On August 8, 1972 the Commission entered an Order approving a lump-sum settlement of Mr. Dillard's individual claim for compensation. (App. 24-25) On December 11, 1972 this Court vacated the judgment of the District Court and remanded the case to the District Court for consideration of mootness. *Dillard, Etc. v. Industrial Commission of Virginia*, 409 U.S. 238.

## B. Willie Williams

On April 14, 1972 appellant Williams was injured in the course of his employment. The Commission, on May 11, 1972, approved an agreed upon award of \$55.92 per week as workmen's compensation benefits. On October 10, 1972 Travelers Insurance Company, insurer of Williams' employer, sent to the Commission, under Amended Rule 13, an Application for a Hearing. (App. 75) Mr. Williams' compensation was discontinued on October 11, 1972. (App. 75) On October 13, 1972 the Commission made its *ex parte* determination under Rule 13 that probable cause existed to believe that Williams' condition had changed. (App. 75) On December 15, 1972 the hearing was held by the Commission at which it was determined that further medical evidence was needed.

On January 22, 1973 Williams moved to intervene in this case. On February 7, 1973, he received back benefits from October 11, 1972 to January 18, 1973, after his counsel had informed the Commission that his benefits had been suspended (October 11, 1972) in violation of Rule 13, as amended, since the "probable cause" determination had taken place on October 13, 1972, 2 days *after* his benefits had been suspended. (App. 81-82)

On February 7, 1973 Mr. Williams agreed to receive partial disability benefits to be figured retroactively to January 18, 1973. (App. 79-80) On April 17, 1973, upon application to the Commission by Travelers Insurance Company, probable cause was again found and his partial disability benefits were suspended. On June 20, 1973 a hearing was held and on July 23, 1973 the Commission ruled that Williams was no longer eligible for benefits. On December 21, 1973 the Supreme Court of Virginia refused to review the Commission's decision.

On June 26, 1973 the District Court granted Mr. Williams' motion for intervention and declared this case to be a class action and not moot. The Court also reinstated the majority and dissenting opinions of July 17, 1972, dismissing the action. (App. 87-89)

### SUMMARY OF ARGUMENT

I. The Virginia workmen's compensation system is a comprehensive scheme, under which all of the parties are forced to act, or not to act, according to detailed laws and regulations. The State has given insurers and employers "legal sanction", *Manchester Board and Paper Co. v. Parker*, 201 Va. 328, 331, 111 S.E.2d 453, 456 (1959), to discontinue benefits pursuant to Rule 13. Since workmen's compensation is entirely a creature of state statutes, therefore, under the principles set out in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, the actions of insurers and employers in discontinuing benefits pending a hearing are "state action" within the meaning of the Fourteenth Amendment.

II. An injured worker relies heavily on his workmen's compensation benefits to meet the needs of daily living. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564. His entitlement to workmen's compensation benefits under the laws of Virginia bring such benefits within the meaning of "property" in the Fourteenth Amendment. *Goldberg v. Kelly*, 397 U.S. 254.

III. The Court has traditionally found that, absent extraordinary circumstances necessitating prompt action, due process must be afforded prior to the deprivation. *Fuentes v. Shevin*, 407 U.S. 67. There are no exceptional circumstances requiring the precipitous discontinuance of workmen's compensation benefits.

IV. The potential harm visited on an injured worker and his family by a suspension of benefits while he is still physically unable to work is of such a magnitude that it clearly outweighs the greater expense to insurers, employers or the general public of affording prior evidentiary hearings. Since the Court has traditionally balanced the interests of the opposing parties to determine what process is due, *Cafeteria and Restaurant Worker Union, Local 743, AFL-CIO v. McElroy*, 367 U.S. 886, it is clear that in the workmen's compensation context only a prior evidentiary hearing will satisfy the dictates of due process. The individualized factual issues, very often of a medical nature, which determine whether a worker is still eligible for benefits, are not susceptible to *ex parte*, one-sided determinations now in effect under Rule 13. Due process in this context requires, at the very least, notice and the opportunity to be heard in defense of one's interests prior to their discontinuance. *Goldberg v. Kelly*, 397 U.S. 254.

## ARGUMENT

### I.

#### THE DISCONTINUANCE OF WORKMEN'S COMPENSATION BENEFITS IS STATE ACTION WITHIN THE FOURTEENTH AMENDMENT

The first Virginia Workmen's Compensation Act was enacted in 1918, *Acts of Assembly, 1918*, p. 637, in response to the widely felt need to change the common law defenses to tort actions brought by workers injured in industrial accidents. *Gobble v. Clinch Valley Lumber Co.*, 141 Va. 303, 305, 127 S.E. 175, 176 (1925). The state did not merely abrogate the unjust defenses in the existing tort actions; rather the legislature created a

comprehensive scheme to insure that workers were compensated for disability or death arising out of and in the course of their employment. The Virginia Workmen's Compensation Act (Title 65.1 of the Code of Virginia of 1950, as amended) (hereinafter referred to as Act) controls virtually every aspect of the problem of compensation for injured workers: from how much compensation is to be paid, Sections 65.1-54, 55, 60 and 65; to what forms can be used, Section 65.1-113; and what rates insurers can charge employers for workmen's compensation coverage, Sections 38.1-7, 218-279.

An employer who comes within the purview of the Act has no choice as to whether he will participate. Sections 65.1-103 through 106, Code of Virginia of 1950, as amended; *Virginia Used Auto Parts, Inc. v. Robertson*, 212 Va. 100, 181 S.E.2d 612 (1971). Each award of compensation, even when it is agreed to by all the parties, must be approved by the Commission, and then only when the Commission "is clearly of the opinion that the best interests of the employee or his dependents will be served thereby." Section 65.1-93, Code of Virginia of 1950, as amended.

Quite early in the administration of this system of compensation the Commission became aware of the problem of employers arbitrarily terminating awards, and the Commission, under the authority of Section 65.1-18, Code of Virginia of 1950, as amended, promulgated Rule 13. *Manchester Board and Paper Co. v. Parker*, 201 Va. 328, 331, 111 S.E.2d 453, 456 (1959):

One of its [Rule 13's] purposes was to eliminate the result which took place in this case, that is, the arbitrary discontinuance of compensation by the employer and the insurance carrier *without legal sanction*. (emphasis added)

The procedures now set out in Rule 13 give "legal sanction" to the discontinuance of workmen's compensation benefits pending a hearing.

As was the case in *Public Utilities Comm. v. Pollak*, 343 U.S. 451, in Virginia the regulatory agency, and even the highest court of the state, have "affirmatively approved the practice of the regulated entity," *Moose Lodge No. 197 v. Irvis*, 407 U.S. 163, 175-176, n. 3, of discontinuing benefits pending a hearing on the issue of fact when it believes the worker is no longer disabled. Since the workmen's compensation system is entirely a creature of the state, and all the parties to it are controlled by its laws and regulations, clearly the State of Virginia has more than a "symbiotic relationship" and is even more than a "partner" with the insurers and employers. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 723-725; cf. *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 119-120.

The appellees throughout this litigation have, as has the majority opinion of the District Court, tried to characterize the issue in this case as a dispute between two private parties. The mere fact that the adversaries in a given case are private parties has not barred this Court from finding that due process attaches under the Fourteenth Amendment. See e.g. *Fuentes v. Shevin*, 407 U.S. 67; *Sniadach v. Family Finance Corp.*, 395 U.S. 337; and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306. As shown above, the employer or the insurer is not acting as a private party, but as an instrumentality of Virginia's workmen's compensation laws, and with its "legal sanction". *Manchester Board and Paper Co. v. Parker*, 201 Va. 328, 331, 111 S.E.2d 453, 456 (1959). Cf. *Marsh v. State of Alabama*, 326 U.S. 501, 507; *Smith v. Allwright*, 321 U.S. 649, 663. They have no freedom



to act under the law in any other way. When they file for a hearing under Rule 13 and discontinue the injured worker's benefits, they are acting pursuant to the statutory scheme which requires that payments be made only during incapacity. Section 65.1-54, Code of Virginia of 1950, as amended. They can no more legally pay benefits to a worker who is no longer injured than they can pay more than the amount specified in the Act, since every contract of employment, Section 65.1-36 Code of Virginia of 1950, as amended, and contract of insurance, Section 65.1-113, Code of Virginia of 1950, as amended, is subject to the provisions of the Act.

The roles played by employers and insurers in the workmen's compensation system have none of the attributes of private parties. They are performing "a public function", *Marsh v. State of Alabama*, 326 U.S. 501, 507, in the strictest sense. The public function they are performing is essentially the same as that performed by government officials in the public welfare, Social Security, or unemployment compensation systems. They are administering funds which the state has directed to be accumulated and disbursed according to explicit and detailed statutes and regulations. Section 65.1-82, Code of Virginia of 1950, as amended, treats workmen's compensation benefits in the same manner as welfare benefits under Section 63.1-88, Code of Virginia of 1950, as amended, making them both unassignable and exempt from claims of creditors. The state chose, in the workmen's compensation system, to have the funds collected through insurance premiums or retained earnings rather than a tax and administered by private parties rather than a state bureaucracy; but these differences in form cannot take the underlying basic state action outside of the scope of the Fourteenth Amend-

ment. Public funds are not ultimately something different from private funds. The controlling consideration, in this context, is whether the funds are free to be used for private, non-governmental purposes, or whether their use is controlled and directed by the State for a public purpose. *Smith v. Allwright*, 321 U.S. 649, 663.

This Court has recently held in *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164, that the explicit statutory denial of workmen's compensation benefits to dependent, unacknowledged illegitimates violates the Equal Protection Clause of the Fourteenth Amendment. Therefore, there could be no possibility of questioning state action in the instant case if the statute or regulation explicitly directed benefits be discontinued upon the filing of an Application for a Hearing. But this Court has never allowed a state to do by indirection that which it could not constitutionally do directly. *Smith v. Allwright, supra, Speiser v. Randall*, 357 U.S. 513, 526. It is clear that after *Weber*, Louisiana could not allow insurance companies to write into their workmen's compensation contracts and enforce the prohibited exclusion. The Constitution cannot be so easily circumvented. Here the Industrial Commission cannot evade the strictures of the Fourteenth Amendment by merely not articulating that which is clearly mandated by the workmen's compensation scheme. When and under what conditions benefits shall be paid are integral parts of the state workmen's compensation system. Section 65.1-75.1, Code of Virginia of 1950, as amended, (20% penalty for failure to pay within two weeks of when due); Section 65.1-73, Code of Virginia of 1950, as amended, (Commission discretion to allow monthly or quarterly payments); Section 65.1-72, Code of Virginia of 1950, as amended, (Commission must approve all

awards of compensation). When workmen's compensation benefits are discontinued in compliance with Rule 13 pending a hearing on whether the worker is in fact still disabled, it is clearly "state action which compels" the employers and insurers to do it. *Smith v. Allwright*, 321 U.S. 649, 664.

At least since 1914 in *McCabe v. Atchison, T. & S.F.R. Co.*, 235 U.S. 151, this Court has not allowed a state to evade constitutional scrutiny by merely giving to private parties the power to act under a scheme in which it is massively involved. See also *Smith v. Allwright, supra*; *Burton v. Wilmington Parking Authority*, 365 U.S. 715.

## II.

### **WORKMEN'S COMPENSATION BENEFITS ARE PROPERTY WITHIN THE MEANING OF THE DUE PROCESS CLAUSE**

In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, the question of what were the attributes of property interests protected by procedural due process was given extended treatment.

It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

*Board of Regents of State Colleges v. Roth, supra* at 577. In *Goldberg v. Kelly*, 397 U.S. 254, 262, it was found that public welfare benefits were "a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights."

There can be little doubt that workmen's compensation benefits for an injured worker are a "claim", "statutory entitlement" or "right" of such importance that they are protected by due process. The Virginia statutory scheme treats them as somewhat similar to wages, cf. *Sniadach v. Family Finance Corporation*, 395 U.S. 337, in that Section 65.1-81, Code of Virginia of 1950, as amended, gives them the same preference or priority "as allowed by law for any unpaid wages for labor", see also *Burlington Mills Corp. v. Hagood*, 177 Va. 204, 209, 13 S.E.2d 291, 293 (1941); and as somewhat similar to welfare, cf. *Goldberg v. Kelly*, *supra*, in that Section 65.1-82, Code of Virginia of 1950, as amended, gives workmen's compensation benefits virtually the same exemption from the reach of creditors as is given to public welfare benefits. Section 63.1-88, Code of Virginia of 1950, as amended. It cannot be argued that the interest a disabled worker has in his workmen's compensation benefits is of less importance than the drivers license to which due process applies. *Bell v. Burson*, 402 U.S. 535. Whether workmen's compensation benefits are considered to be traditional property rights, statutory entitlements, or important interests, it is clear that the reasons for granting procedural due process apply.

### III.

#### DEPRIVATION OF PROPERTY MUST BE PRECEDED BY DUE PROCESS

Once it is determined that a property interest is within the terms of the Fourteenth Amendment, any taking of that interest by state action must meet the requirements of due process.

The decisions in this area indicate that, absent exceptional circumstances, due process must be provided before any deprivation takes effect. In *Fuentes v. Shevin*, 407 U.S. 67, 82, this Court stated:

... the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.

Even a temporary, non-final deprivation must be preceded by an opportunity to be heard, since its temporary nature does not change the fact of deprivation itself. *Fuentes v. Shevin*, *supra* at 82. See also *Bell v. Burson*, 402 U.S. 535, 542; *Sniadach v. Family Finance Corporation at Bay View*, 395 U.S. 337, 339; and *United States v. Illinois Central Railroad Co.*, 291 U.S. 457, 463.

There are two basic reasons which the Court has found to give rise to this principle. One reason is,

the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

*Fuentes v. Shevin*, *supra* at 81. This importance our system gives to protecting an individual citizen's liberty and property has dictated that there be a prior notice and hearing before such diverse situations as prohibiting sale of intoxicating beverages to suspected alcoholics, *Wisconsin v. Constantineau*, 400 U.S. 433, terminating welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254, and allowing garnishment of wages in satisfaction of a debt, *Sniadach v. Family Finance Corporation of Bay View*, 395 U.S. 337.

Second, this Court has traditionally refused to adopt the view that a wrong may be done simply because it may be undone at a later time. *Stanley v. Illinois*, 405 U.S. 645, 647, *Fuentes v. Shevin*, 407 U.S. 67, 82. Conse-

quently, it has consistently chosen, in the absence of extraordinary circumstances, to require due process prior to the proposed deprivation, rather than to merely require a later hearing to see if it is necessary to correct a mistaken or improper deprivation. It is the deprivation itself, not its consequent severity or length of time, that is proscribed by the Constitution, *Fuentes v. Shevin*, *supra* at 84-85, so that in order to be meaningful, the due process must come at a time when the wrongful deprivation can be prevented, not when all that can be done is to right the wrong. *Armstrong v. Manzo*, 380 U.S. 545, 551.

There are two situations in which individuals may be deprived of property interests prior to their opportunity to be heard in defense of those interests. One involves the legislative or rule making due process, as opposed to the adjudicative or judicial due process involved in this case. Despite the fact that one's property interests may be at stake, a legislature or rule making body is not required by Due Process to consult each and every interested party before acting, since the hearings that they hold serve only to inform the rule-making agency of facts, concepts and other matters helpful to the formation of policy and the promulgation of rules. Davis, *Administrative Law Treatise* (1958), Section 7.06. Consequently, in *Opp Cotton Mills v. Administrator*, 312 U.S. 126, relied upon heavily by the majority of the District Court below, this Court found that Due Process did not require the Administrator under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* to give notice and a hearing to every affected textile manufacturer prior to setting a minimum wage for its workers. Such hearings do not adjudicate individual facts such as those contemplated in the case at bar.

The other exception to the general principle occurs where an important governmental or public interest is at

stake, and exceptional circumstances require prompt action to deprive an individual of a property interest for a public benefit which would otherwise be lost. Such situations have been found to include the destruction, without prior notice and hearing, of possibly putrid food in order to prevent severe harm to consumers, *North American Cold Storage v. City of Chicago*, 211 U.S. 306, and the seizure, without prior notice and hearing, of drugs misbranded in a manner misleading and possibly harmful to consumers, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594. See also, *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29 (bank failure); *Ownbey v. Morgan*, 256 U.S. 94 (secure jurisdiction of a court).

It is the fundamental constitutional dictate of fairness which has required due process before deprivation of property interests in the diverse situations which this Court has considered over the years. The "brutal need" felt by the welfare recipient in *Goldberg v. Kelly*, 397 U.S. 254, 261, is not the measure that individuals must meet in order to have due process prior to deprivation of their property interest. Nor is it the balancing of interests between the individual and the government, since such balancing relates only to the *form* of the hearing and not whether one is required before deprivation occurs. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-571, ns. 7-8. The determining factor has been the absence or presence of a governmental or public emergency that can only be averted through prompt action. If such an emergency is present, hearings to determine the propriety of deprivation of property rights can be postponed; otherwise, the right to be heard must precede. *Armstrong v. Manzo*, *supra*; *Fuentes v. Shevin*, *supra*; *Sniadach v. Family Finance Corp. of Bay View*, *supra*; *Bell v. Burson*, *supra*; *Goldberg v. Kelly*, *supra*; *United*

*States v. Illinois Central Railroad Company, supra.* Appellants contend that it is readily apparent that no such governmental emergency exists in the case at bar.

#### IV.

#### **ONLY A PRIOR EVIDENTIARY HEARING WILL SATISFY DUE PROCESS SINCE THE INJURED WORKER'S INTEREST FAR OUTWEIGHS ANY OTHER INTERESTS**

When a Fourteenth Amendment right is the subject of deprivation, and no supervening governmental emergency requires prompt action, the Due Process Clause must be satisfied prior to the deprivation. It is at this point that this Court has traditionally turned to the balancing of interests to determine exactly what process is due. *Cafeteria and Restaurant Workers Union, Local 743, AFL-CIO v. McElroy*, 367 U.S. 886, 895.

The majority in the District Court apparently found that the Due Process Clause was satisfied by Rule 13 in this case. (App. 52) However, the Court below did not analyze the interests of the parties in the discontinuance of workmen's compensation benefits. If one balances the interests in this case, it is clear that only a prior evidentiary hearing will meet the requirement of due process, and that the *ex parte* review by an employee of the Commission, without notice to the injured worker, which is all that is required by Rule 13, is not sufficient.

The interests of an injured worker and his family are, at the very least, pressing. Their major interest is in the uninterrupted receipt of benefits on which they have been forced to rely in meeting their daily needs. The average one month suspension (App. 37) surely represents grievous injury to a family that has been living on 66 and 2/3rds percent of its average weekly income, to a



maximum of \$70 per week. Section 65.1-54, Code of Virginia of 1950, as amended. To a family budget which has been cut by one-third, a total stoppage—however brief—could easily be disastrous. Appellants in this case have a need for their compensation which is just as “brutal” as that of the welfare recipient in *Goldberg v. Kelly*, 397 U.S. 254, 261. The likelihood of their ability to live off of savings during the pendency of their cases is remote, especially in view of the length of time involved (from an average of one to possibly eight months (App. 37)). Even if one assumes that a worker will have some savings left after having lived for a length of time on workmen’s compensation benefits of 66 and 2/3rds of his average weekly wage up to a maximum of \$70 per week, this would not automatically distinguish him from the welfare recipient since an individual may still be eligible for welfare with as much as \$400 in savings, (Section 304.3B, Volume II, Manual of Policy and Procedure, Virginia Department of Welfare and Institutions) and, therefore, still considered in brutal enough need to be afforded a prior evidentiary hearing. And it is clear that the State of Virginia recognizes the brutality of the need for workmen’s compensation by exempting it from the reach of creditors, Section 65.1-82, Code of Virginia of 1950, as amended, just as it does for welfare, Section 63.1-88, Code of Virginia of 1950, as amended.

Even an injured worker’s ability to resort to welfare to mitigate the crushing effects of this need on himself and his family is made extremely problematical by the fact that he must be either blind, 42 U.S.C. §§1201 *et seq.*, over 65 years of age, 42 U.S.C. §§1381 *et seq.*, raising a family without a spouse, 42 U.S.C. §§601 *et seq.* (since Virginia does not participate in the AFDC program for unemployed fathers, 42 U.S.C. §607),

permanently and totally disabled, 42 U.S.C. §§1351 *et seq.*, or fortunate enough to live in one of the counties or cities in Virginia that has a local General Relief program, Section 63.1-106, Code of Virginia of 1950, as amended. Since neither welfare nor savings are viable or realistic alternatives, the injured worker may be forced to return to work before he is physically ready in order to support his family and possibly further aggravate his physical condition.

The harm done to the injured worker may be irreparable in a very real sense: greater physical damage by going back to work too quickly; loss of all compensation by letting the hearing go by default; being forced by the economic pressure to accept less than a compensatory settlement; or suffering some severe blow to the economic stability of the family such as eviction or repossession.

[T]ermination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.

*Goldberg v. Kelly*, 397 U.S. 254, 264. See also, *Sniadach v. Family Finance Corporation of Bay View*, 395 U.S. 337, 341-342.

Balanced against these interests and considerations are the interests of the insurer or employer, and, in a broader perspective, the interests of the government and consuming public. The insurer's or employer's interest lies in the increased financial burdens of paying compensation to those workers who are found to be no longer disabled, while hearings and decisions are pending. Under the present law in Virginia, Section 65.1-99, Code of Virginia of 1950, as amended, benefits paid cannot be recovered. This statute can, of course, be changed if the legislature

of Virginia feels it is important to do so. If the state refuses to permit an increase in the insurance rates, which are subject to its control, the insurance company's burden cannot be eased by passing the added expense on to the employers who would then pass it on to the public in the form of higher prices for goods or services.

The interest of the public is no less weighty, for realistically it is the public who will ultimately bear the expense resulting from increases in operating the compensation system.

The governmental interest does not come down wholly on one side or the other. Naturally there is the public's interest in having the most effective, least expensive and most efficient system of compensating injured workers. Nevertheless, as in the case of an *eligible* welfare recipient, *Goldberg v. Kelly*, 397 U.S. 254, 264, there is an important governmental interest in seeing that an injured worker who is still eligible for compensation is not mistakenly terminated. The broad humanitarian goals which the Court set out in *Goldberg* counseling for the uninterrupted aid to eligible welfare recipients, apply equally if not more strongly for injured workers. Also, there is the governmental interest in seeing that an injured worker recovers from his disability and returns to become a productive member of society. Protecting against his being forced back to work too early or being forced onto welfare obviously promotes this latter governmental interest.

This Court is asked to weigh the "claims upon which people rely in their daily lives" *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, against an increased cost to the general public or less profit for some segments of the business community. When these factors have been put on the constitutional scale by the Court, there has

never been any doubt but that the individual's right to his "property" is much weightier.

[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy.

*Stanley v. Illinois*, 405 U.S. 645, 656.

The analysis in the dissenting opinion in *Fuentes v. Shevin*, 407 U.S. 67, 97, merits detailed comparison with that of the case at bar, since it demonstrates that in this case the "practical considerations involved" weigh heavily in appellant's favor. The dissent is predicated on two basic propositions: first, that it is not in a seller's interest to act precipitously in instituting replevin since he will usually lose money by terminating the installment contract; and second, the kind of evidence and factual determinations required to settle the usual debtor-buyer vs. creditor-seller disputes are easily obtainable, since they involve no more than the question of whether "the debtor-buyer has either defaulted or he has not". *Fuentes v. Shevin*, *supra* at 100. (White, J. dissenting)

The case at bar presents a different situation entirely. First, the insurer's or employer's economic interest will almost always be served by suspending benefits and requesting a hearing when they have the slightest doubt as to a worker's eligibility. There will always be some workers who, although they are still disabled and therefore eligible, will not contest their claim. One can get an indication of the number of people whose benefits would not have to be paid by this attrition of those who "default" in this way, by the studies which have been

done on the huge percentage of "default judgments" which are obtained in our lower courts. *The Persecution and Intimidation of The Low-Income Litigant as Performed by the Small Claims Court in California*, 21 Stanford L.R. 1657, 1660 (1969); cf. *Fuentes v. Shevin*, 407 U.S. 67, 83, n. 13, indicating people's reluctance to enter such an arena. Second, the financial pressures which fall on the worker and his family once his source of income is discontinued, puts the insurer in a much better bargaining position to compel the acceptance of a "lump sum" settlement (Section 65.1-93, Code of Virginia of 1950, as amended) of a less than compensatory amount. Cf. *Sniadach v. Family Finance Corporation of Bay View*, 395 U.S. 337, 341. Therefore, the "dollars and cents" considerations indicate that the employer or insurer will gain significantly by acting to terminate benefits prior to a hearing, unlike the creditor-seller. *Fuentes v. Shevin*, 407 U.S. 67, 100 (White, J. dissenting)

Furthermore, the issues to be considered in "change of condition" hearings in workmen's compensation cases often involve conflicting and highly technical evidence, not the simple facts and findings required in the usual replevin situation. Most disputes are resolved by the medical evidence, and where there is a conflict of expert opinion in the evidence, the resolution of the dispute requires diligent evaluation and careful consideration. There are no typical situations such as the usual buyer-debtor versus seller-creditor relationship. *Fuentes v. Shevin*, 407 U.S. 67, 100 (White, J. dissenting). A cursory reading of any one of the volumes of the published Opinions of the Industrial Commission of Virginia (hereinafter referred to as OIC) will show that the likelihood of mistaken discontinuance of benefits, given the hard factual questions at issue, is "sufficiently real . . . [and] recurring to justify a broad constitutional

requirement", *Fuentes v. Shevin*, *supra* at 100 (White, J. dissenting), of a full prior evidentiary hearing.

The issues in "change of condition" hearings under Rule 13 are almost always such that a straightforward honest presentation of the evidence available to only one side will give probable cause to believe (under Rule 13) that the change has occurred. Often the insurer will have the report of one doctor stating that the worker is no longer disabled, while at a hearing another doctor's report will give the opposite conclusion. And since the insurer must meet the burden of proof, *J.A. Foust Coal Co. v. Messer*, 195 Va. 762, 80 S.E.2d 533 (1954), the worker will still be eligible. This of course is what happened to Mr. Dillard. (App. 13-16) See also, e.g. *Charles v. Aileen, Inc.*, 53 OIC 35 (August 25, 1971) (conflicting opinions of two orthopedists); *Collins v. Carpenter Construction Co., Inc.*, 53 OIC 43 (August 24, 1971) (conflicting medical opinions). Another common reason for insurers applying for a hearing is their belief that the worker has unjustifiably refused medical attention. Section 65.1-88, Code of Virginia of 1950, as amended. This also happened to Mr. Dillard. (App. 17) See also, e.g. *Baker v. Fairfax County School Board*, 53 OIC 11 (August 5, 1971) (failure to lose weight does not constitute unjustified refusal of medical treatment); *McAdoo v. Meadowbrook Country Club*, 53 OIC 175 (April 22, 1971) (failure to keep medical appointment justified since claimant lived alone with no one to care for her and went to mother's home out of state). Cf. *Dowell v. Pulaski Furniture Corp.*, 53 OIC 84 (May 11, 1971) (claimant did not unjustifiably refuse offered employment, Section 65.1-63, Code of Virginia of 1950, as amended).

In the above cases before the Commission, taken from just a six month period, as in those of appellants Dillard and Williams, compensation was received, then

terminated, and then restored after long periods of waiting without income, and only after a later due process hearing where these people were able to demonstrate that they were still eligible.

Since the questions to be decided in change of condition hearings to determine whether compensation is no longer due are issues of very individualized facts, the process which has traditionally been required is: meaningful and timely notice of the opportunity for a hearing; a hearing before an impartial fact finder at which there is an opportunity to present evidence in one's own behalf, and refute, by cross examination or otherwise, the evidence against you; and a decision based solely on the evidence adduced at the hearing. *Goldberg v. Kelly*, 397 U.S. 254, 267-271 (and cases cited therein).

The procedures in effect now under Rule 13 afford none of the above protections. There is no requirement at all of notice. Section 65.1-94, Code of Virginia of 1950, as amended. The letter which was sent to Mr. Williams (App. 75) gave him no meaningful information as to what the procedure which was being set in motion, was like, or what he could do to protect his interests if he disagreed. The time between the filing of the Application for Hearing and the finding of "probable cause" is not set out, and in Mr. Williams' case was so short (App. 75), that it was impossible for him to prepare his case with such things as additional medical examinations or tests. There is of course no hearing at all, and no opportunity for the injured worker to present evidence even if he had it readily at hand. Furthermore, there is no prohibition imposed on the person who determines "probable cause" from eliciting information on his own.

[F]airness can rarely be obtained by secret, one-sided determination of facts, decisive of rights.

*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (Frankfurter, J., concurring).

Only when an injured worker is afforded the above protections *before* his benefits are discontinued will he have been provided "those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." *Morgan v. United States*, 304 U.S. 1, 19.

### CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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January 31, 1974







**Supreme Court of the United States****OCTOBER TERM, 1973**

MICHAEL ROBAK

JOHN R. DILLARD and WILLIE WILLIAMS, individually and on  
behalf of all other persons similarly situated,

v.

*Appellants,*

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER,  
Chairman, Industrial Commission of Virginia, M. ED-  
WARD EVANS, ROBERT P. JOYNER, Commissioners of the  
Industrial Commission of Virginia, and AETNA CASUALTY  
AND SURETY COMPANY,

*Appellees.*

On Appeal From The United States District Court  
For The Eastern District of Virginia

**BRIEF FOR  
THE AMERICAN FEDERATION OF LABOR AND  
CONGRESS OF INDUSTRIAL ORGANIZATIONS,  
UNITED STEELWORKERS OF AMERICA, AFL-CIO,  
AND ELLENMAE CROW  
AS AMICI CURIAE**

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**Supreme Court of the United States**  
**OCTOBER TERM, 1973**

**NO. 73-5412**

JOHN R. DILLARD and WILLIE WILLIAMS, individually and on behalf of all other persons similarly situated,

v.

*Appellants,*

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER, Chairman, Industrial Commission of Virginia, M. EDWARD EVANS, ROBERT P. JOYNER, Commissioners of the Industrial Commission of Virginia, and AETNA CASUALTY AND SURETY COMPANY,

*Appellees.*

**On Appeal From The United States District Court  
For The Eastern District of Virginia**

**BRIEF FOR  
THE AMERICAN FEDERATION OF LABOR AND  
CONGRESS OF INDUSTRIAL ORGANIZATIONS,  
UNITED STEELWORKERS OF AMERICA, AFL-CIO,  
AND ELLENMAE CROW  
AS AMICI CURIAE**

This brief as *amici curiae*, in support of the position of the appellants, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), United Steelworkers of America, AFL-CIO, and Ellenmae Crow, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

**INTERESTS OF AMICI CURIAE**

The AFL-CIO is a federation of 113 national and international unions having a total membership of approximately 13,500,000 working men and women. The United Steelworkers of America is an international union with a membership of approximately 1,250,000 workers.

The question in the instant case is whether an injured working man or woman receiving workmen's compensation can have the payments he or she is receiving under an award cut off by reason of an *ex parte* determination that there is "probable cause to believe" that there has been a "change in condition." The Federation and the Steelworkers have a two-fold interest in the manner in which this question is resolved.

First, the individual members of the AFL-CIO and the Steelworkers constitute the largest single class of beneficiaries of the workmen's compensation system. The nature of the procedures utilized in that system is therefore a major concern of these organizations. Second, the Federation and the Steelworkers are petitioners in *Crow, AFL-CIO and Steelworkers v. California Department of Human Resources Development, et al.*, Supreme Court of United States, No. 73-1015. The question presented in that case, which is presently pending on a petition for a writ of certiorari, is whether a procedure for terminating unemployment benefits which does not afford a recipient prior notice, a meaningful chance to obtain representation and gather evidence, an opportunity to appear personally and confront and cross-examine witnesses, or a decision by an impartial decision-maker based solely upon evidence adduced at a hearing, satisfies either the "when due" or "fair hearing" requirements of the Social Security Act, or due process. As emphasized in that petition (at pp. 7-8), while the context provided by the unemployment and workmen's compensation systems implicate different factors, that may justify differing results in this case and in *Crow* (see pp. 21-23 *infra*), the question presented here and that presented

there, are, in terms of basic constitutional principle, closely brigaded. Thus, the decision in the instant case may have substantial ramifications on the course of the *Crow* litigation.

Ellenmae Crow, individually and on behalf of all others similarly situated, is also a petitioner in the above noted unemployment compensation case pending before this Court. Her interest in the instant case is identical to the second of the interests of the AFL-CIO and the Steelworkers just described.

### **ARGUMENT**

#### **1. *Statement Of The Issue Presented And Of The Case.***

Litigation is a method for determining whether the *status quo ante* shall be changed. The impetus for a judicial or administrative determination is the moving party's demand that another change his course of conduct or that he be treated differently, and the latter's refusal to voluntarily agree. Such determinations take time, often in considerable amounts. Delay is thus an inherent cost of this method of dispute settlement. Who shall bear that cost is, therefore, of critical significance. The legal rules which govern that determination are those which set the terms upon which interim relief pending a final decision on the merits is available. Initially, the costs of delay are on the moving party. The preliminary injunction shifts those costs to the other party. Moreover, in a system providing for appeals the costs of delay are on the appellant. A stay shifts those costs to the appellee. Because of its cost-shifting function, interim relief is often more important in practical terms than the final determination on the merits.



It is therefore essential that the rules governing such relief embody neutral principles that, to the extent possible, limit overall social costs.

The instant case tests the validity under the due process clause of the Fourteenth Amendment of the procedure Virginia has adopted to allocate the costs of delay incident to the filing, by an employer or his insurance carrier, of an application for review of an award of workmen's compensation, alleging a "change in condition" of the injured worker receiving compensation by virtue of that award. *See*, § 65.1-99, Code of Virginia.

The essentials of the procedural setting were stated by the court below:

"Pursuant to the Act, compensation is paid for all workmen coming within the provisions of the Act if injured during the course of their employment.

. . . .

"The Commission, operating within the general regulatory and judicial functions, is charged with the administration of the Act. When an employee is injured, he may enter into a 'Memorandum of Agreement' with his employer or the employer's insurance carrier, stipulating the right to compensation, and the period of payment. The memorandum is then submitted to the Industrial Commission for approval. This was the procedure followed in the case at bar. If an agreement is not approved, or if the parties have not been able to agree, the matter is heard and determined by the Commission. \* \* \* .

"A review of an award may be had upon motion of the Commission or of any party in interest 'on the ground

of a change in condition.' Virginia Code Section 65.1-99. Upon such review, the Commission may increase or decrease the compensation previously awarded, but no such review 'shall affect such awards as regards money paid.' Virginia Code 65.1-99." A. 47, 48.

That court then noted that the effect of Rule 13 of the Industrial Commission of Virginia is that

"the Commission will not hear the petition of the employer or insurer asserting any change in condition if payments under the award have not been made up to the date the application is deemed filed, with an admonition that benefits *shall not* be suspended until the supporting evidence submitted with the petition has been reviewed and it is determined probable cause exists to believe a change has occurred, and if a finding of a probable cause is made, the application will then be deemed filed." A.51; emphasis in original.

And the lower court went on to hold that

"assuming that the Rule does not provide for notice and a hearing to the employee prior to termination of the award, and that the Rule is authority for the employer or insurer to terminate payments, under the facts and circumstances in this case the State function involved does not constitute a denial of due process." A.52.

Thus, the court below recognized that as a matter of Virginia law, injured workers who have received an initial award have a right to receive compensation (and that insurers have a corresponding obligation of payment) until the Commission determines that there has been "a change

in condition.”<sup>1</sup> But it held that this right and this obligation may be cut off through an *ex parte* procedure in which the insurer, who has the burden of proof in the eventual hearing on the merits (e.g., *J.A. Foust Coal Co. v. Messer*, 195 Va. 762, 80 S.E. 2d. 533), is merely required to demonstrate that “probable cause exists;” the injured worker’s only recourse being a subsequent hearing on the merits several months later.<sup>2</sup> In other words, that court sanctioned the shifting, to the injured worker, of the costs of litigation delay attendant upon an insurer’s application, without providing the worker any opportunity to be heard, and without conditioning the granting of this preliminary relief on proof that the insurer is more likely than not to prevail.

That understanding of the requisites of the Fourteenth Amendment cannot be squared with the basic principles of due process enunciated by this Court.

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<sup>1</sup> In the court below the parties engaged in an extended debate as to whether the challenge here was to “state action.” The appellants also brief that question at length to this Court. The court below found the existence of state action to be so clear that it proceeded directly to the Fourteenth Amendment issue posed. In this it was entirely correct. The procedures the Commission utilizes to determine whether there has been a “change in condition” are certainly “state action.”

<sup>2</sup> The lower court without citation to the record placed the average time for a subsequent hearing at one month. A. 52. But the State admitted that the average time necessary to secure a hearing and decision (grouping all cases heard) was three months, and that the range was from one to eight months. A. 31, 37. There is nothing to indicate that there is any distinction in terms of time between hearings on initial eligibility and hearings concerning cut offs.

## 2. *The Right to a Prior Hearing*

(a) We start from the central constitutional premise relevant here, as stated in the most recent precedent in point, *Board of Regents v. Roth*, 408 U.S. 564:

“When protected interests are implicated, the right to some kind of prior hearing is paramount.

• • • •

“Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, ‘except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.’ *Boddie v. Connecticut*, 401 U.S. 371, 379. ‘While “[m]any controversies have raged about . . . the Due Process Clause,” . . . it is fundamental that except in emergency situations . . . due process requires that when a state seeks to terminate [a protected] interest . . . , it must afford “notice and opportunity for hearing appropriate to the nature of the case” before the termination becomes effective.’ *Bell v. Burson*, 402 U.S. 535, 542.” *Id.* at 569-570, n. 7; emphasis in original.

This case, like *Roth*, is *not* one presenting a “rare and extraordinary situation in which this Court [has] held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing,” (*id.* at 510, n.7). Those have uniformly been situations in which health, safety, or a general public interest has been immediately threatened: “[T]he Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure and to protect the public from misbranded drugs and con-

taminated food." *Fuentes v. Shevin*, 407, U.S. 67, 91-92; footnotes omitted. Certainly, there is no governmental interest of comparable magnitude in this case. Here as in *Fuentes*, the state has "allow[ed] summary seizure of a person's possession when no more than private gain is directly at stake," (*id.* at 92).

(b) "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Roth*, 408 U.S. at 569. Mr. Justice Stewart went on to state:

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.

"Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg v. Kelly*, 397 U.S. 254). . . .

"To have a property interest in a benefit, a person clearly must have a legitimate claim of entitlement to it.

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in

*Goldberg v. Kelly, supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them." *Id.* at 576, 577; footnote omitted.

As we have shown (pp. 5-6 *supra*), Virginia law creates a right to compensation in injured workers who have received an initial award, and an obligation in the insurer to make payments to them, until the Commission determines that there has been a "change in condition." It follows that here, as in *Goldberg v. Kelly*, 397 U.S. 254, the individuals threatened with a cut off do have "a legitimate claim of entitlement to" payment. For this case, like *Goldberg*, involves "person[s] receiving . . . benefits under statutory and administrative standards defining eligibility for them, [who] have an interest in continued receipt of those benefits." Thus, the interest in this case is one "safeguarded by procedural due process." *Roth, supra*.

In *Roth*, the Court drew a sharp distinction between the test for determining whether due process requires a prior hearing, and the criteria for determining the *form* of a required prior hearing:

" 'The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.' *Boddie v. Connecticut*, [401 U.S. at] 378. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 263; *Hannah v. Larche*, 363 U.S. 420. The constitutional requirement of opportunity for *some* form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process." 408 U.S. at 570-571, n.8; emphasis in original.



Rather, that constitutional right exists whenever the party seeking the hearing has a "property" or "liberty" interest: "[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Id.* at 570-571; emphasis in original.

What has been said thus far demonstrates that a protected interest in property is implicated here. This being so, the holding of the court below (A.52), that due process does not require *any* form of prior hearing, is clearly wrong.<sup>3</sup>

### 3. *The Form Of The Prior Hearing*

The lower court compounded its error by sanctioning a procedure in which a moving party seeking to deprive another of a property right may secure preliminary relief: without notice to the latter; and without demonstrating that he (the moving party) is more likely than not to prevail on the merits.

(a) The Chief Justice has reminded that this Court has

"stated time and again that reasonable notice of a charge and an opportunity to be heard in defense

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<sup>3</sup> That court's emphasis on the fact that a subsequent hearing was available (A. 52), was entirely misplaced:

"The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind." *Puentes*, 407 U.S. at 86.

before punishment is imposed are 'basic in our system of jurisprudence.' *In re Oliver*, 333 U.S. 257, 273. \* \* \* We have emphasized this fundamental principle where rights of less standing than personal liberty were at stake. E.g., *Sniadach v. Family Finance Corp.* 395 U.S. 337; *Groppi v. Leslie*, 404 U.S. 496, 502.

*Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339, cited in *Groppi*, held that a garnishment procedure whereby a "wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have," pending "the trial of the main suit," does not accord with the Fourteenth Amendment. The due process interest protected in *Sniadach* is parallel to that here. Workmen's compensation is the injured workers' substitute for the wages he had previously earned.

So far as we are aware, no opinion of this Court has even suggested that in a non-emergency situation, a procedure that fails to meet the requirements stated in *Groppi* could pass constitutional muster. Thus, injured workers receiving workmen's compensation are plainly entitled to a prior hearing affording them "reasonable notice" and "an opportunity to be heard in defense." *Groppi, supra*.

To be sure, providing these safeguards imposes some costs in terms of added delay and administrative expense. But

"A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. See *Bell v. Burson*, [402 U.S.] at 540-541; *Goldberg v. Kelly*, 397 U.S. at 261. Procedural due



process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken." *Fuentes*, 407 U.S. at 90, n.22. See also, *Stanley v. Illinois*, 405 U.S. 645, 656.

(b) The norm reflected, *inter alia*, in the law of injunctions, is that to secure preliminary relief the "movant must show a substantial likelihood of success on the merits," (*Delaware & Hudson R. Co. v. U.T.U.*, 450 F.2d 603, 619 (C.A.D.C.), *cert. denied*, 403 U.S. 911). That is the minimal standard necessary to meet the requirements of procedural due process here. "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall*, 357 U.S. 513, 525. Thus, "In civil cases \* \* \* this Court has struck down state statutes unfairly shifting the burden of proof." *Id.* at 524. As Mr. Justice Harlan explained, concurring in *In re Winship*, 397 U.S. 358, 370-371:

"First, in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what probably happened. The intensity of this belief—the degree to which a factfinder is convinced that a given act actually occurred—can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases 'preponderance of the evidence' and 'proof beyond a reasonable doubt' are quantitatively imprecise, they do communicate to the finder of fact different notions

concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

"A second proposition, which is really nothing more than a corollary of the first, is that the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions. In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. \* \* \* On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. \* \* \*

"The standard of proof influences the relative frequency of these two types of erroneous outcomes. \* \* \* Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each."

The inquiry is, therefore, what standard of proof in preliminary workmen's compensation proceedings will create the least "social disutility."

The injured worker who is receiving payments under an initial award has a property interest in those payments. *See*, pp. 8-10, *supra*. Indeed, they are a basic form of income maintenance, upon which workers rely as being continuously available should they become injured on the job. *See*, pp. 15-16, *infra*; A. 64.

"Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken de-

privations of property, however, it is axiomatic that the hearing must provide a real test. '[D]ue process is afforded only by the kinds of "notice" and "hearing" that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property. . . .' *Sniadach v. Family Finance Corp.* [395 U.S.] at 343." *Fuentes*, 407 U.S. at 97.

No "test" is provided by a standard of proof that permits property deprivations where the taker is not required to show the likelihood of success on the merits. By definition, to relax the standard to a mere showing of "probable cause" to believe that the taker can prove a case, is to maximize, and not, as is required,

"to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party." *Fuentes*, 407 U.S. at 81.

It would be unthinkable for workmen's compensation to be permanently terminated in cases where the insurer has not convinced the trier of fact that his position is correct. *Sniadach* and *Fuentes* teach that an improper preliminary deprivation of workmen's compensation is also a constitutional wrong: "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Stanley v. Illinois*, 405 U.S. at 647, quoted in *Fuentes*, 407 U.S. at 82. Thus, a taking that would be unlawful if done on a permanent basis is equally unlawful if done on a temporary basis, at least in the absence of the most substantial overriding considerations. There are no such considerations here.

The only state interest claimed by Virginia is fulfillment of its "duty to *both* private parties to see that they receive a fair shake." Motion to Affirm, p. 5; emphasis in original. That interest is *not* served by preliminary relief on a mere showing of "probable cause." The higher standard of proof required by due process does not impose any cost whatsoever on the State. It is no more time consuming or difficult to apply one standard than the other. And the State starts from the premise that it has no interest as to which of the parties before it prevails.

In contrast, the harm caused to the injured worker by misallocating the burden of proof may be overwhelming.

First, workmen's compensation normally is the injured worker's sole source of income. Workers who do the hard and dirty jobs are typically among the lowest paid and are the most likely to utilize the workmen's compensation system. Thus, loss of compensation, even more than the loss of a portion of wages through garnishment, "may as a practical matter drive a wage-earning family to the wall," (*cf.*, *Sniadach*, 395 U.S. at 341-342).

Second, the premature cut off of payments may, therefore, force the still injured worker to return to the job to support his family. The dangers thereby caused are too high a price to pay in a civilized society.

Third, for the same reasons, a premature cut off provides the insurer with "enormous \* \* \* leverage" (*Sniadach*, 395 U.S. at 341), to force the worker into an unconscionable settlement.

Finally, the "probable cause" standard provides a significant incentive to insurers to file insubstantial ap-

plications. The insurer has everything to gain and nothing to lose in attempting to cut off the injured worker. Where all that need be proved is "probable cause," the likelihood of success is great and the cost of preparing a "case" is minimal. As to Virginia's "safeguards" against abuse by insurers (A. 51), Judge Merhige stated the obvious when he commented that "while the theory may sound well, as a practical matter it is useless. \* \* \* I can hardly see the threat of assessment of attorney's fees or costs being of any consequence in the instant situation," (A. 64).

The insurer's interest, of course, is to make as few payments as possible. That interest, to the extent it is legitimate, is met through a system which permits preliminary relief upon a showing that the insurer is more likely than not to prevail on the merits. We do not blink at the fact that this higher standard may result in some erroneous payments. But, given the "humane purposes" (A.61), of workmen's compensation, which reflects the public interest in continued payments to workers injured on the job, this consequence creates far less "social disutility" (*Winship*, 397 U.S. at 371), than the consequences of the "probable cause" standard.

In concluding this portion of our argument, we note that the Court is considering a related standard of proof question, arising in a sequestration context similar to the replevin situation presented in *Fuentes. Mitchell v. W. T. Grant Co.*, No. 72-6160; oral argument presented Dec. 4, 1973. Without addressing the result that should be reached there, we emphasize that neither of the countervailing factors with which Mr. Justice White was concerned in his dis-

sent in *Fuentes*—that “the likelihood of a mistaken claim . . . is [not] sufficiently real,” and that it is not in the interest of the moving party to take “precipitate action,” (407 U.S. at 100),—is present here. *See*, Appellant’s Brief at pp. 22-24, which demonstrates the absence of these countervailing factors in the workmen’s compensation setting.

(c) Given what has been shown thus far, reversal and a remand is required, with directions to the lower court to order the State: to provide a prior hearing embodying “reasonable notice” and “an opportunity to be heard in defense,” (*Groppi*, 404 U.S. at 502); and to grant relief to an insurer only upon a showing that he is more likely than not to prevail on the merits.

Beyond this the exact form of the prior hearing “depend[s] on the importance of the interests” involved, (*Roth*, 408 U.S. at 557, n.8). Neither the lower court opinion nor the record contain a full recitation of the facts relevant in evaluating those interests. For example, the exact nature of Virginia’s present procedure is not spelled out, and there is no record evidence on the experience under that procedure. In *Fuentes*, 407 U.S. at 96-97, and *Christian v. New York State Department of Labor*, — U.S. —, 42 L.W. 4181, 4184 (Jan. 21, 1974), the Court, in similar circumstances, remanded to allow the development of a more complete record and to secure the benefit of a lower court opinion. The same course would appear appropriate here.

(d) In the event the Court chooses nonetheless to take this occasion to state the precise form of hearing required, we show, in brief outline, why only an “evidentiary pre-termination hearing,” (*Wheeler v. Montgomery*, 397 U.S.

280, 282),—*viz.*, a meaningful opportunity to obtain representation and gather evidence, an opportunity to appear personally, offer evidence, confront and cross-examine witnesses, and a decision by an impartial decision-maker based solely upon evidence adduced at a hearing—will suffice. *See, Goldberg v. Kelly*, 397 U.S. at 267-271.

This Court has never determined whether an evidentiary pre-termination hearing is required, where, as here, there is not “undisputed ownership,” (*Fuentes*, 407 U.S. at 86), but rather competing private claims to the property in question. It is settled only that such hearings must be held where a cut off of sustaining funds (like welfare) is threatened and the competing claimant is the government. *See, Goldberg v. Kelly*, *supra*. While that is the paradigm case, it cannot be assumed to be the exclusive instance.

The right to an evidentiary pre-termination hearing is determined by a “weighing process,” (*Roth*, 408 U.S. at 570). In striking the balance, this Court’s recognition that procedures which do not minimize “unfair and mistaken deprivations of property,” (*Fuentes*, 407 U.S. at 97), of the “person whose possessions are about to be taken,” (*Id.* at 90, n.22), impose an intolerable social cost, is of decisive weight.

Of course, no system of adjudication can insure against mistaken deprivations of property. *See*, pp. 12-13, *supra*. But in the context of the workmen’s compensation system only an evidentiary pre-termination hearing holds the realistic promise of producing generally accurate results. The questions posed on an application alleging a “change in condition” are simply too complex to be resolved correctly



in a summary fashion. Those applications raise such issues as the extent of medical recovery, whether there has been a refusal to accept a job suitable to the injured worker's capacity, and whether there has been a refusal of medical attention. *See*, Va. Code §§ 65.1-8, 65.1-63, 65.1-88. Thus, they require the resolution of contrasting professional opinions and conflicting versions of events. *See*, Appellant's Brief at pp. 24-25, and the cases there cited. As our court calendars attest this is grist for the adversary mill.

We fully recognize that the more complex the procedure, the greater the possibility of financial loss to insurers occasioned by payment to workers no longer eligible. However, the harm to injured workers improperly cut off through summary procedures that do not afford them an adequate opportunity to defend themselves against their insurers' charges, and the damage to the social purpose favoring the continued payments to such workers, is far greater. *See* pp. 15-17, *supra*. In every instance, the insurer makes the charge of "change in condition" on the basis of evidence within his possession. The injured worker is consequently placed in the position of having to rebut the insurer's allegations. Thus, the position of the injured worker in the litigation process is in all essential respects the same as that of the welfare recipient in *Goldberg v. Kelly*, *supra*. And what the Court said there is precisely in point here:

"[The evidentiary hearing is] important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.

• • • •



"The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing \* \* \*. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in any termination proceedings, written submissions are a wholly unsatisfactory basis for decision. \* \* \*

"In almost every setting where important decisions turn on questions of facts, due process requires an opportunity to confront and cross-examine adverse witnesses. \* \* \* What we said in *Greene v. McElroy*, 360 U.S. 474, 496-497, is particularly pertinent here:

"\* \* \* [w]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.'

\* \* \* \*

" 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel' \* \* \* Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. \* \* \*

"Finally, the decision-maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. \* \* \* To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relies on \* \* \*, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law." 397 U.S. at 268-271, footnotes omitted.

#### 4. *The Relationship, And The Distinctions, Between The Instant Case And The Crow Case.*

In setting out the interests of the *amici curiae* we noted (at pp. 2-3, *supra*), that the AFL-CIO, the Steelworkers, and Mrs. Crow are joint petitioners in No. 73-1015, presently pending before this Court on their petition for a writ of certiorari. It remains, therefore, to discuss the issues presented here against the background provided by *Crow*.

The *Crow* case involves the termination in summary fashion of unemployment benefits due to unemployed workers who previously had been found initially eligible for a fixed number of weeks. The procedure utilized there did not provide an "evidentiary pre-termination hearing," (*Wheeler*, 397 U.S. at 282). (Indeed, the procedures followed in *Crow* were in essence those struck down in *Wheeler*.) Thus, the issue developed in the *Crow* record and treated by the lower courts was whether the safe-

guards enumerated in *Goldberg v. Kelly*, 397 U.S. at 267-271, apply to unemployment benefit cut offs as well as to the termination of welfare benefits.

As we have noted, the right to an evidentiary pre-termination hearing in any particular situation is determined by a "weighing process" of the interests involved. *Roth*, 408 U.S. at 570. This, of course, is not the occasion to develop the precise weight to be accorded each of the various interests present in *Crow*. It is sufficient for present purposes to state that it is our position therein that unemployment terminations present perhaps a more compelling case for a prior evidentiary hearing than welfare terminations. The factual issues are more complex; the governmental interest in summary adjudication is far less substantial since recoupment of overpayments is available; like welfare, unemployment benefits are vitally needed, often providing the sole means of subsistence, but unlike welfare, unemployment compensation is an *earned* "contractual right" upon which Congress intended workers to be able to rely should they become involuntarily unemployed. *California Department of Human Resources Development v. Java*, 402 U.S. 121, 131. Thus, it follows that the procedural safeguards enumerated in *Goldberg* are applicable in *Crow*.

The instant case is one involving competing claims of private parties (the injured worker and the insurer) to a single corpus of funds. Thus, it falls within the broad category, that also includes *Sniadach*, *Fuentes* and *W. T. Grant*, in which the interests that militate against an evidentiary pre-termination hearing are those of the other private party.

In contrast, the *Crow* case, like *Goldberg v. Kelly* and *Wheeler*, involves a dispute solely between the recipient of a program of sustaining public benefits and the government. Unemployment benefits, in contrast to workmen's compensation, are paid directly "by the state out of state funds derived from taxation." *N.L.R.B. v. Gullett Gin Co.*, 340 U.S. 361, 364; see, *Java*, 402 U.S. at 136 (Douglas, J., concurring). Moreover, unlike workmen's compensation, the state regulates and administers all phases of the unemployment benefits program, investigating all claims for benefits, resolving all eligibility issues without regard to any agreements between private parties, and defending termination decisions as an adverse party in further administrative and judicial proceedings. See, Virginia's Motion to Affirm, pp. 5-6. The government, of course, unlike a private insurer, has no competing due process claim.

Thus, while the conclusion is compelling that an evidentiary pre-termination hearing is required in the instant case, which is one of first impression, the conclusion that such a hearing is required in *Crow* is mandated by *Goldberg*.

**CONCLUSION**

For the above stated reasons, as well as those stated by the appellants, the decision below should be reversed.

Respectfully submitted,

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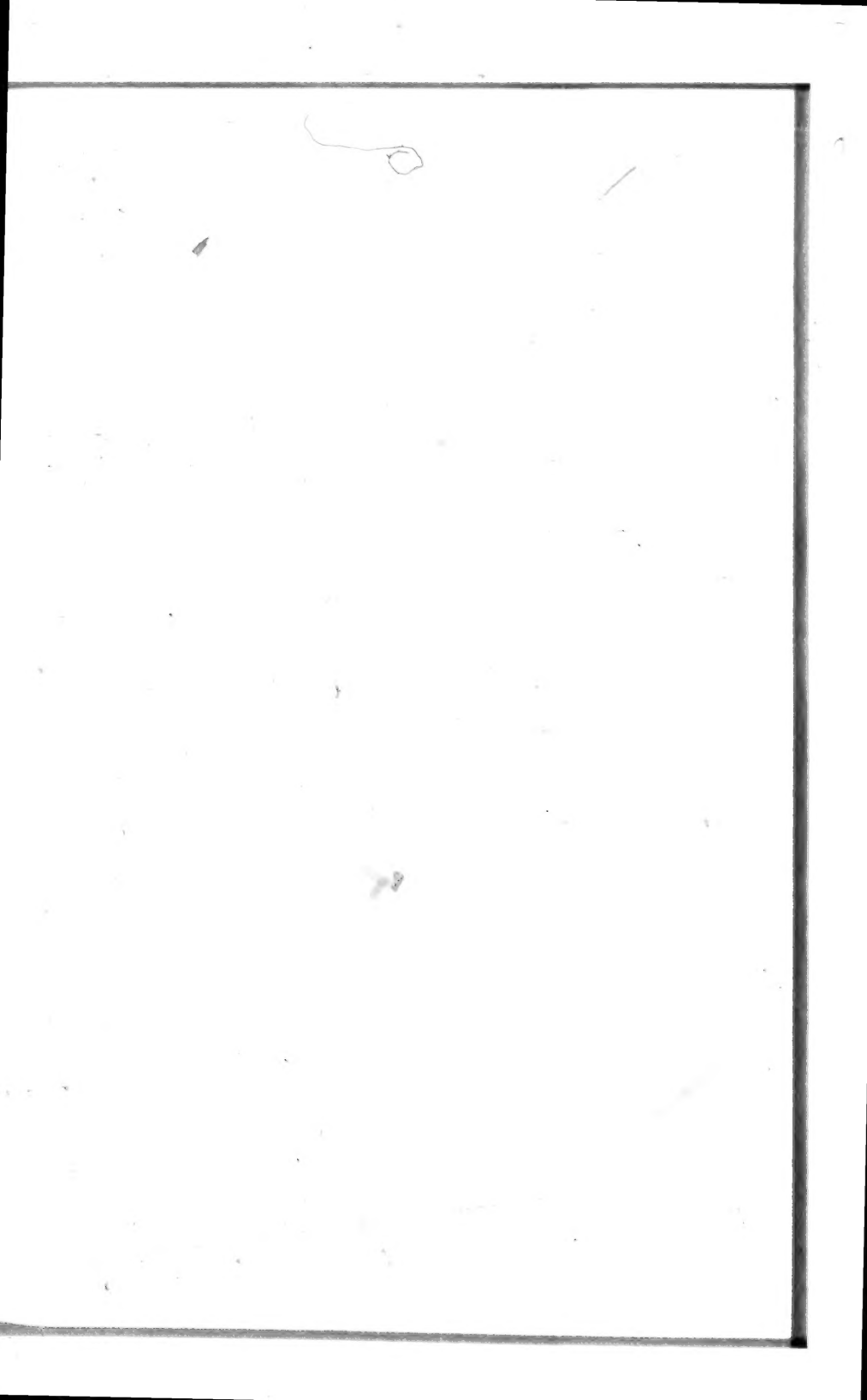
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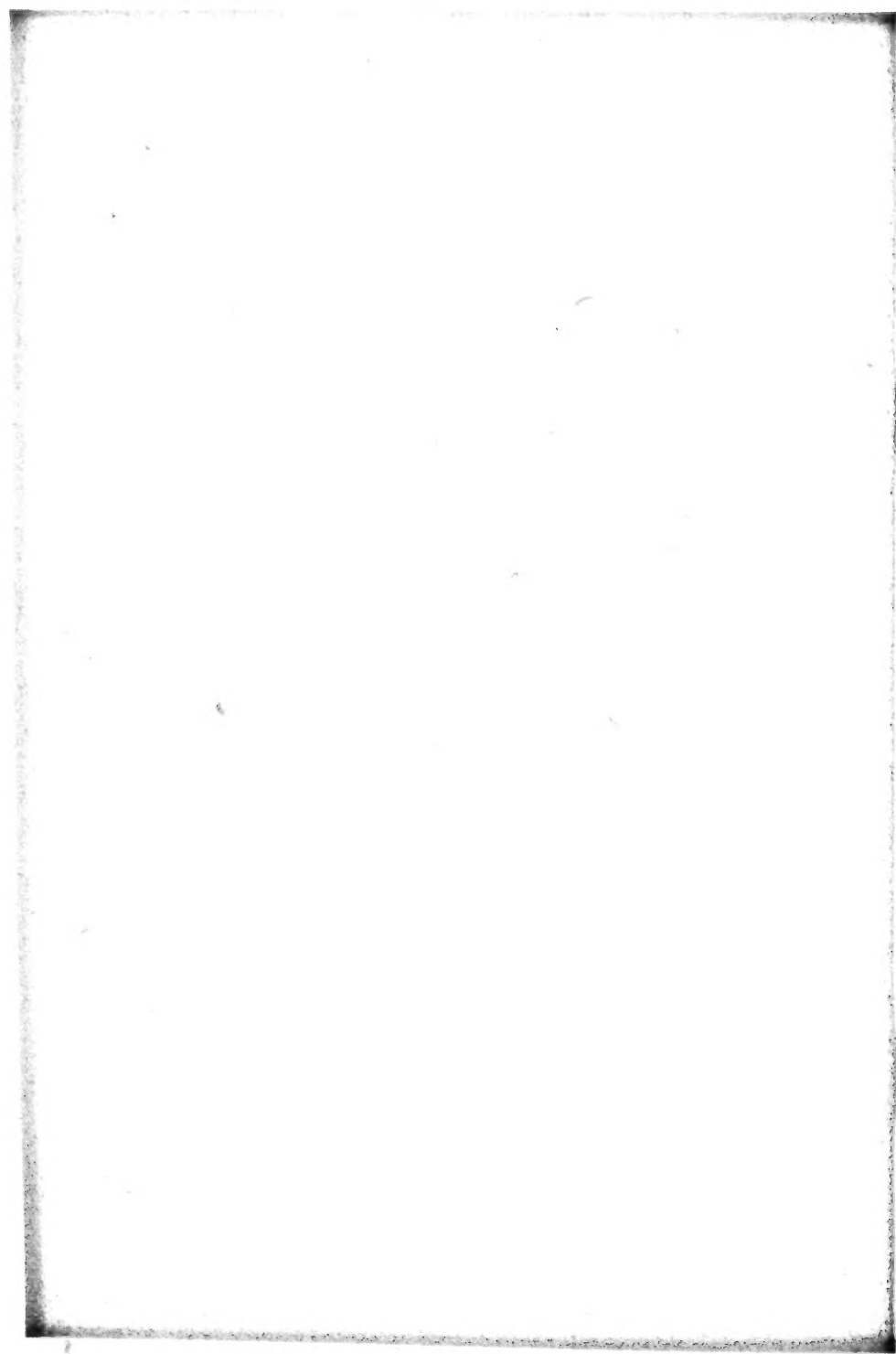
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February, 1974





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# Supreme Court of the United States

October Term, 1973

No. 73-5412

JOHN R. DILLARD and WILLIE WILLIAMS,  
individually, and on behalf of  
all other persons similarly  
situated,

v.

*Appellants,*

INDUSTRIAL COMMISSION OF VIRGINIA,  
THOMAS M. MILLER, Chairman, Industrial Commission  
of Virginia, M. EDWARD EVANS, ROBERT P. JOYNER,  
Commissioners of the Industrial Commission of Virginia,  
and AETNA CASUALTY AND SURETY COMPANY,

*Appellees.*

On Appeal from the United States District Court for the  
Eastern District of Virginia

BRIEF FOR APPELLEE  
AETNA CASUALTY AND SURETY COMPANY

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# Supreme Court of the United States

October Term, 1973

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No. 73-5412

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JOHN R. DILLARD and WILLIE WILLIAMS,  
individually, and on behalf of  
all other persons similarly  
situated,

*Appellants,*

v.

INDUSTRIAL COMMISSION OF VIRGINIA,  
THOMAS M. MILLER, Chairman, Industrial Commission  
of Virginia, M. EDWARD EVANS, ROBERT P. JOYNER,  
Commissioners of the Industrial Commission of Virginia,  
and AETNA CASUALTY AND SURETY COMPANY,

*Appellees.*

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On Appeal from the United States District Court for the  
Eastern District of Virginia

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BRIEF FOR APPELLEE  
AETNA CASUALTY AND SURETY COMPANY

---

## STATEMENT

### A. John R. Dillard

Appellant, John R. Dillard, was injured on March 15, 1971. On March 30, he and his employer, Roanoke Mills, Incorporated, entered into a Memorandum Agreement whereby Aetna Casualty & Surety Company ("Aetna")

would pay plaintiff \$40.80 per week until there was a "change of condition." On April 7, 1971, the Industrial Commission of Virginia ("Commission") approved this agreement. (App. 11).

On June 3, 1971, Aetna brought Dillard's payments up to date, filed an application for a hearing upon an alleged change in condition and ceased further payments. (App. 12). The Commission scheduled a hearing for July 16. On August 25, 1971, the Commission ruled that Dillard was still unable to work and continued the original award. (App. 13-16).

On September 16, 1971, Aetna filed another application for a hearing based on Dillard's alleged refusal of medical treatment and notified Dillard of its actions and reasons. (App. 17). Compensation was discontinued as of the date of filing, and on October 19, 1971, this suit was filed. On October 22, 1971, at the request of Roanoke Mills, Incorporated and Aetna, the Commission dismissed the application for a hearing.

On February 24, 1972, defendants answered interrogatories. (App. 30-33 and 36-38). On March 21, 1972, the Commission amended Rule 13.

#### **B. Willie Williams**

Appellants' brief adequately states the facts before the Court with regard to the intervenor, Willie Williams.

#### **VIRGINIA'S WORKMEN'S COMPENSATION ACT**

The Act provides compensation, in the nature of insurance, to a workman or his dependents in the event of his death, for the loss of his opportunity to engage in gainful employment when his disability or death was occasioned

by accidental injury or occupational disease arising out of and in the course of his employment. The pecuniary loss incident to payment of compensation to an employee is cast upon his employer as an expense of the business, *Fauver v. Bell*, 192 Va. 518, 65 S.E.2d 575 (1951); but it is not a form of health insurance, *Rust Eng. Co. v. Ramsey*, 194 Va. 975, 76 S.E.2d 195 (1953).

The Act was intended to eliminate the employer's common law defenses of assumption of risk, fellow servant and contributory negligence. Lower courts frequently held initially that workmen's compensation laws took the employer's property without due process. *E.g.*, *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911). This Court, however, consistently held that they were within the police power of the state. *Arizona Copper Co. v. Hammer*, 250 U.S. 400, 419 (1919).

Although in derogation of the common law, the Virginia Act is liberally construed in favor of the workman. *Griffith v. Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E.2d 530 (1942).

The Act is enforced by the Industrial Commission of Virginia, an administrative agency having both regulatory and judicial functions. The Commission operates within a general legislative framework and provides an impartial and informed forum for disputes that arise under the Act.

A hearing before the Commission provides speedier recovery and more informal rules of evidence than a traditional court. The Commission is admonished to keep its procedures and rules "as summary and simply as reasonably may be." Va. Code § 65.1-18.

Awards are commenced either by Commission approval of a Memorandum of Agreement between the employer and



employee (App. 11) or a decision of the Commission. An award to an employee consists of medical benefits for at least three years and weekly benefits of the lesser of  $66\frac{2}{3}\%$  of his average weekly wage or \$80.00 "during such incapacity."<sup>1</sup> The award may be based on temporary total incapacity, temporary partial incapacity, permanent partial incapacity or death. It continues until modified or terminated by the Commission.

Although the award commands the employer to make certain payments, it is not self-executing. Va. Code § 65.1-100. An outstanding award must be enforced by a court of general jurisdiction. The Commission and courts are, however, empowered to apply fines and other penalties to recalcitrant employers. Va. Code §§ 65.1-75.1 and -101.

There are three procedural methods of terminating or modifying an outstanding award. First, the employee and employer may execute an Agreed Statement of Facts by which they agree that conditions have changed which justify a termination of the award. Second, the employee and the employer may enter into a Supplemental Memorandum of Agreement whereby the terms of the outstanding award are modified by either increasing or decreasing the compensation. Third, the employer or employee may file an application for hearing based on a change of condition.

Under early practice some employers arbitrarily disregarded the effects of outstanding awards and terminated payments. *Manchester Board and Paper Co. v. Parker*, 201 Va. 328, 331, 111 S.E.2d 453, 456 (1959). To protect the employee from this conduct, the Commission required the employer or carrier to pay all back compensation under an outstanding award as a condition to

<sup>1</sup> Depending on the nature of injury, there may be a maximum number of weeks of benefits. E.g., Va. Code §§ 65.1-54-56 (Supp. 1973).

obtaining a hearing on an application for review of award on the ground of a change in condition. In upholding a constitutional challenge to the rule, the Supreme Court of Appeals of Virginia held that the rule was constitutional although it might cause "harsh results" for the employer. *Manchester Board and Paper Co. v. Parker, supra*, 201 Va. at 331, 111 S.E.2d at 456.

On March 21, 1972, the Commission increased the employee's protections. Under Rule 13, the Commission will not now grant an employer or carrier a hearing until the petitioner (1) pays the award to date,<sup>2</sup> (2) files a verified application stating the reasons for the termination, and (3) furnishes evidence which the Commission finds sufficient to show probable cause that there is a change in condition. As a matter of practice, applicants notify the claimant simultaneously with the filing of the application. (App. 17 and 75).

Applicants usually cease paying compensation at the time they file the application based on a change of condition, but the actual award is changed only by order of the Commission following a full hearing or agreement of the parties. Although the award speaks in terms of continuing "during incapacity," incapacity can be challenged only before the Commission. Therefore, the employee can enforce payments even after the Commission finds "probable cause" to believe a change has occurred and schedules a hearing just as he can enforce an award against a recalcitrant employer who suspends payments without probable cause. A decision favorable to the employer speaks as of the date of

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<sup>2</sup> If the application is based on Va. Code § 65.1-63 (refusal of selective employment), § 65.1-88 (Supp. 1973) (refusal of medical attention) or § 65.1-91 (refusal of medical examination), the employer must pay the benefits to within 14 days of the application or the date of occurrence, whichever last occurs.

filing, but the employer has no right of recoupment or set-off against the employee. Va. Code § 65.1-99; *Manchester Board and Paper Co. v. Parker, supra*.

Thus, if the Commission accepts an employer's application, the employer is granted a hearing. If the employer prevails, the benefits do not resume unless the employee has a subsequent change in condition justifying a reinstatement of the award. If the Commission rejects the employer's application for termination or modification of benefits, the award is not modified and continues to be enforceable in a court of record.

Although the award is payable "during incapacity," circumstances other than recovery or return to work may disentitle the employee to payments. If an employee wrongfully refuses medical attention (Va. Code § 65.1-88 [Supp. 1973]), selective employment (§ 65.1-63) or medical examination (§ 65.1-91), the Commission must terminate the award.

An employee may have benefits reinstated 14 days prior to his application under Va. Code § 65.1-99 or on the date of change of condition, whichever last occurs.

### SUMMARY OF ARGUMENT

I. The Commission's award continues "during incapacity" but remains outstanding until altered or terminated by the Commission. The award is not self-executing, but may be enforced in a court of general jurisdiction. Rule 13, promulgated pursuant to the Commission's power to control its own procedures, requires an employer to pay the award to date and show probable cause that there has been a change in the employee's condition before the Commission will schedule a hearing. Even though employers usually suspend payments after an application is docketed, the

award continues and may be enforced in court until terminated by the Commission. The failure of the Commission to attempt to require payment to the date of final decision is neither "state action" nor is the employer's suspension done "under color of state law." Therefore the Court below lacked jurisdiction.

II. The dispute involves competing private claims for employers' funds. Every gain to employees comes at the expense of employers. Virginia has been sensitive to the needs of the employees. The Commission does not alter or terminate its awards until after a full due process hearing. The Virginia Workmen's Compensation procedures now furnish employees the process they are constitutionally due, and this Court should not alter that balance in the name of an abstract due process. To restrict further the employer's access to Commission hearings would deny them due process.

## **ARGUMENT**

### **I.**

#### **The Court Below Lacked Jurisdiction Over The Claim Herein Asserted.**

Claiming deprivation of rights granted by 42 U.S.C. § 1983 and, thereby, § 1 of the Fourteenth Amendment, appellants alleged jurisdiction under 28 U.S.C. §§ 1343(3), 2201, 2202, 2281 and 2284 (App. 6 and 70).

Sections 2281 and 2284 require a three-judge district court to exercise certain categories of jurisdiction granted elsewhere. Likewise, §§ 2201 and 2202, establishing declaratory judgment procedures, do not confer jurisdiction.

Thus, the only arguable jurisdictional basis is 42 U.S.C. § 1983, the Civil Rights Act of 1871. This Act proscribes only acts taken under color of a statute, ordinance, regu-

lation, custom or usage, of any State or Territory. The legislative history of the Civil Rights Acts of this period<sup>3</sup> shows that Congress feared that officials and citizens would use affirmative grants of state power to abuse and harass the freedmen. The Act's prohibitions were later expanded to abuses of authority by law enforcement officials. *Monroe v. Pape*, 365 U.S. 167 (1961). They have not been extended to private acts.

This Court has stated that "two elements are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or usage of any State or Territory.'" *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). Appellants have not made this distinction.

A. THE CONSTITUTION AND LAWS OF THE UNITED STATES DO NOT PROHIBIT A VIRGINIA EMPLOYER FROM SUSPENDING WORKMEN'S COMPENSATION BENEFITS PENDING A HEARING.

1. *An Employer's Temporary Suspension Of Payments Does Not Involve "State Action"*.

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), this Court stated that it was an "impossible task" to "fashion and apply a precise formula for recognition of state responsibility \* \* \*." Eleven years later, this Court still acknowledged that "the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'state action,' on the other hand, frequently admits of no easy answer." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972).

<sup>3</sup> Collected in A. Avins, *The Reconstruction Amendments' Debates* (1967). See, also, *The Slaughter-House Cases*, 16 Wall. 36 (1873).

The clear case is where state officers commit the wrong, but the remaining decisions fall into recognizable categories:

(a) Cases in which the private party's action occurred in the course of an enterprise in which the state is a partner or joint venturer. *E.g.*, *Burton v. Wilmington Parking Authority*, *supra* and *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir.), *vacated and remanded with instructions to dismiss*, 409 U.S. 815 (1972).

(b) Cases in which a state custom or statute compels the act. *E.g.*, *Adickes v. S. H. Kress & Co.*, *supra* and *Moose Lodge No. 107 v. Irvis*, *supra* at 177-79 (1972).

(c) Cases in which a governmental agency affirmatively orders or specifically approves the challenged act of a closely regulated public utility. *E.g.*, *Public Utility Commission v. Pollack*, 343 U.S. 451 (1952).

(d) Cases in which a private agency acts on behalf of the state and furnishes a typical governmental service. *E.g.*, *Marsh v. Alabama*, 326 U.S. 501 (1946).

(e) Cases in which private parties are empowered by statute or regulation to invade the premises or property of another. *E.g.*, *Palmer v. Columbia Gas Company*, 479 F.2d 153 (6th Cir. 1973) and *Fuentes v. Shevin*, 407 U.S. 67 (1972).

Aetna's suspension of payment does not fit these categories. The disputed funds came from the claimant's employer, and neither it nor Aetna is a "partner" of the Commission. The Commission did not order the suspension nor did a statute or custom of Virginia compel Aetna's act. Contrary to appellants' argument (Appellants' Brief 10-11), wage continuation payments are not traditional govern-

mental functions, and certainly Aetna has not "dedicated" its funds to a public purpose. See, *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972). In summary, Virginia no more empowered or required Aetna to suspend payments than Pennsylvania empowered or required Moose Lodge No. 107 to refuse service to Mr. Irvis. *Moose Lodge No. 107 v. Irvis*, *supra*.

Most cases cited by appellants involve governmental funds, governmental sanctioned intrusions, or discriminatory legislation. None of these situations is involved here.

Aetna's private funds must not be confused with the public funds in *Goldberg v. Kelly*, 397 U.S. 254 (1970). All citizens have an interest in public funds which must be disbursed so as to "promote the general welfare." Cf., *Flast v. Cohen*, 392 U.S. 83 (1968). The ability of a government to tailor hearings to minimize its losses have made government largess the "new property."<sup>4</sup> By contrast, neither Aetna nor Roanoke Mills can choose the type of hearing they will be given; they must accept the form dictated by the state. Finally, neither the state nor national government can deprive Aetna or Roanoke Mills of their property without due process.

If this case involves governmental interference with property, the victim is the employer, not the employee. As appellants admit (Appellants' Brief 9-10), without Rule 13 the only method by which an employee could enforce his rights in the outstanding award would be by litigation in a court of record. In Rule 13, the Commission found a procedural method of insuring that an employee receives compensation to the date of his employer's application. The sanction was refusal to grant the employer a hearing. When Rule 13 was amended in 1972, the Commission,

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<sup>4</sup> C. Reich, *The New Property*, 73 Yale L.J. 733 (1964).

in effect, held that it would not undertake the administrative burden of scheduling and holding the hearing unless the employer could establish that it had reasonable grounds to believe that there was a change in condition. During the interim between the acceptance of the employer's application and the Commission's order following a full hearing, the award remains outstanding and enforceable. As a practical matter, hearings are so prompt that there is minimal recourse to court enforcement.

Seen in this light, Rule 13 is a procedural enhancement of the employee's rights. It supplements, rather than replaces, the employee's rights at the full hearing. Thus, the position of the employer is like that of the debtor in *Fuentes v. Shevin*, *supra* at 87, *et seq.* The creditor-employee seeks additional interim state intervention requiring additional payments prior to a hearing on the employer-debtor's claim of excuse. Unlike *Fuentes*, however, the employer-debtor can never recoup the amounts paid between the notice and hearing. Va. Code § 65.1-99. Moreover, the employee still has the same enforcement rights against the employer during this interim period as he had prior to the employer's application, and if the employer fails to prove a change in condition, the employee is immediately made whole.

Aetna admits that state action is involved in the act of legislating. See, e.g., *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) and *Stanley v. Illinois*, 405 U.S. 645 (1972). However, the state action challenged in these cases was improper legislative classification. Appellants do not herein allege a discriminatory classification, so the equal protection cases are inapplicable.

The focus of appellant's attack is Rule 13. The Commission's promulgation of Rule 13 and its "probable cause" determination before scheduling each hearing involve state action. However, neither action suspends payments to an



employee. There is no deprivation of protected rights, because a Virginia employee never had—under common law or statute—a stronger claim to payments than he now has under Rule 13.

In attempting to satisfy the requirement of state action, appellants apparently contend that employers and insurance carriers act as government surrogates and that as such their funds are public property (Appellants' Brief 11-12). However, no dedication of funds to the public has been shown, and employer and insurer do not, by virtue of the Virginia Workmen's Compensation Act, become the equivalent of public agencies.

In support of their position, appellants argue that the state could have chosen to pay workmen's compensation itself rather than require private parties to make the payments. But the fact that superficially similar services such as welfare payments are provided by the state does not mean that a private party has dedicated its property to the public. *Lloyd Corp. v. Tanner, supra* at 569-70 (1972). "The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use." *Id.* at 569. The funds of employers and insurers do not lose their private character merely because employees are granted claims against employers during disability.

Virginia has chosen to limit rather than prohibit a private party's suspension of payments prior to a full hearing. Appellants seek to transmute this failure to prohibit into state action. Their argument may be summarized as follows: Having improved employees' rights against their employers, Virginia acted (or aided the employers in acting) by not giving the employees even greater rights against their employers. This theory of state action by inaction was widely discussed in academic circles prior to passage of the Civil Rights Act of 1964 and 1968, but it has not

prevailed in this Court. *Cf.*, *Evans v. Abney*, 396 U.S. 435 (1970). See, also, *Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638, 647-48 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973). The reason is obvious. To accept this proposition is to add a § 6 to the Fourteenth Amendment: "No State shall permit private parties to commit acts herein denied the States."

2. *Appellants' Expectancy In Receiving Additional Payments By Commission Order Is Not "Property."*

"Property" is an elastic concept encompassing personal right in tangible goods or income protected by law. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 551, et seq. (1972). Expressed differently, a test of property is the legitimacy of one's "concern" over a claim. *Board of Regents v. Roth*, 408 U.S. 564, 576, et seq. (1972). Unless an employer desires a hearing, an employee must enforce his award in a court of record. Thus the "concern" or expectancy of an employee, whose employer has probable cause to believe he is no longer entitled to benefits, has even less legitimacy, and he should not be given a greater property interest.

Compared to the cases they cite, appellants' claim to "property" is weak. In *Lynch v. Household Finance Corp.*, *supra*, for example, petitioner owned his savings. In *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1972), petitioner had clear property in the earned wages. And in *Fuentes v. Shevin*, *supra*, the debtors had possession. Thus, unlike other cases involving conflicting private interests, appellants have neither title nor possession. The award is for payments "during incapacity"; "[w]hen incapacity ceases, the award ceases to exist." *Dillard v. Industrial Commission*, 347 F.Supp. 71, 75 (E.D.Va. 1972) (App. 46, 52).

**B. AETNA'S SUSPENSION OF BENEFITS WAS NOT DONE UNDER COLOR OF ANY VIRGINIA STATUTE, REGULATION, CUSTOM OR USAGE.**

Aetna's decision to suspend benefits was unilateral and not pursuant to any directive from the Commonwealth of Virginia. On the contrary, Rule 13 restricted its inherent right to control its own funds by requiring that certain procedures be followed in the event it desired a hearing to determine whether Mr. Dillard's condition had changed.

Rule 13 does not direct or authorize employers and insurers to suspend payments; there is no statute or regulation which compels the suspension of payments upon compliance with the procedural steps of the Rule. *Dillard v. Industrial Commission, supra*, at 74-75 (App. 50-51). And to support § 1983 jurisdiction, custom or usage "must have the force of law by virtue of the persistent practices of state officials." *Adickes v. S. H. Kress & Co., supra* at 159. Under the undisputed evidence, neither the state nor its officials compelled or encouraged Aetna to suspend Mr. Dillard's benefits. Indeed, appellants admit that the employer's self-interest is the motivation for termination (Appellant's Brief 22).

Unlike the state of California in *Reitman v. Mulkey*, 387 U.S. 369 (1967), Virginia has not encouraged insurance carriers to suspend payments or given them greater rights to do so than they had at common law. There is no showing of conspiracy or joint action between Aetna and state officials which causes the suspension of benefits.

Appellants have failed to distinguish between actions which are performed by private parties pursuant to compulsion by the state and private actions which are voluntary and without compulsion by the state or its officials. Unless the challenged action is performed by private

parties in lieu of the state or in obedience to some positive provisions of state law or custom, the action does not furnish a basis for a claim under § 1983. The fact that state law or custom permits the act is not sufficient to support a finding of action under color of state law. *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845, 847 (4th Cir. 1959); *Western v. Hodgson*, 359 F.Supp. 194, 199 (S.D.W.Va. 1973); *Kirksey v. Theilig*, 351 F.Supp. 727, 732 (D. Colo. 1972); *Warren v. Cummings*, 303 F.Supp. 803, 806 (D. Colo. 1969).

Dillard's real complaint is not that Aetna acted under color of state law in terminating his benefits but that there was no state action to restrict further Aetna's ability to terminate. But § 1983 speaks to action by the state or its officials, not inaction. Even if § 1983 is interpreted to prohibit the state's failure to enforce valid laws, which would be unlawful as a denial of equal protection, inaction in failing to enact legislation to correct private action is beyond the scope of § 1983. See, *Adickes v. S. H. Kress & Co.*, *supra* at 167, fn. 39.

Before Rule 13 was adopted, employers could terminate payments without prior procedural restriction. Termination of benefits was "without legal sanction". *Manchester Board and Paper Co. v. Parker*, *supra*, 201 Va. at 332, 111 S.E.2d at 456. Prior to the adoption of Rule 13, therefore, the insurance carrier was not acting under color of state law in terminating benefits but rather was exercising its inherent right to control its own funds, subject to subsequent review.

Appellants apparently contend that with the adoption of Rule 13, the state undertook to sanction suspension of benefits. They conclude that when an employer or carrier suspends benefits after following the procedures of Rule 13, it is

acting under color of state law. This position ignores the procedural nature of Rule 13, however. *Manchester Board and Paper Co. v. Parker, supra*, 201 Va. at 328, 111 S.E.2d at 456.

Virginia does not sanction the suspension or enforce the termination, since the question whether suspension is proper remains for determination at a full hearing. Only then is the award terminated. No one can properly equate an interim procedural restriction on an employer or carrier's ability to obtain a hearing with a "legal sanction." *Cf., Evans v. Abney, supra*.

## II.

**The Procedures Established Under Rule 13 Adequately Balance The Conflicting Interests Of Employee And Employer And Grant The Employee The Process He Is Constitutionally Due.**

"Due process" is not a procrustean standard making the same procedural demands in all situations. Rather, its requirements depend on the legislative and common law background, a weighing of the interests involved and notions of fair play. The present balance amply protects the interim interests of the employee.

**A. THE STATUTORY COMPENSATION SCHEME REPRESENTS AN IMPROVEMENT IN AN EMPLOYEE'S RIGHT OF RECOVERY FROM HIS EMPLOYER FOR WORK RELATED DISABILITY.**

The Virginia workmen's compensation scheme guarantees an employee a sure, speedy and simple method of recovering for job related disability. Employers are required to provide workmen's compensation coverage for all employees. A review of the history of the Act shows continual changes in the procedures and recoveries favoring the employees.

*E.g.*, Va. Code § 65.1-55. Each advance has been at the employer's expense.

*Lindsey v. Normet*, 405 U.S. 56 (1972), more closely parallels this case with regard to the common law rights of the parties than any case cited by appellant. Oregon's statutory scheme eliminated the landlord's common law right to self-help eviction. This change gave the tenant-debtor greater protection. The landlord, however, was given a speedy hearing on his right to possession, and the tenant's defenses at the hearing were limited. In approving this procedure, this Court recognized that to favor the tenant further tended to deny the landlord his constitutional rights to his property without due process. *Id.* at 67, fn. 13.

As did the Oregon legislature in *Lindsey*, the Virginia legislature altered the common law balance between parties. Virginia eliminated the employer's common law defenses and guaranteed the employee's recovery for work related disabilities. Virginia made a major improvement in the area emphasized by appellants—the need for immediate compensation. At common law, recovery could be had only after the extent of the injury could be ascertained, suit filed, matured and tried to a conclusion. With appeal, recovery could be years away. The record shows that Mr. Dillard began receiving payments 23 days after injury (App. 41) —a major improvement over the common law.

**B. THE COST OF RULE 13 FALLS ON THE INDIVIDUAL EMPLOYER;  
A FURTHER WEIGHING OF THE SCALES IN FAVOR OF THE EMPLOYEE  
WOULD VIOLATE THE EMPLOYER'S CONSTITUTIONAL  
RIGHTS.**

Appellants have spoken of Dillard and Williams' needs, but their needs are not representative of the Class. Workmen's compensation comes to all covered employees—rich and poor, hourly paid and executive. There is no need test;

the beneficiary can be a millionaire movie star or a marginal worker. Moreover, termination of workmen's compensation does not deprive an employee of access to welfare programs. Depending on the facts of the case, appellants may be entitled to "emergency relief" under the general welfare laws (Va. Code § 63.1-106), food stamps (7 U.S.C. § 2011, *et seq.*), commodity assistance (7 U.S.C. § 1431), and a host of other public and private relief programs.

The employee's interest must be weighed against the competing interest of his employer. Absent agreement, the employer can petition the Commission to amend its award only according to the procedures of Rule 13. If appellants prevail here and Mr. Williams returns to work, Richmond Guano Co., his employer must continue compensation payments and wages until the Commission scheduled a hearing and issued a decision. Richmond Guano would have no right of offset, and the Commission would be powerless to affect amounts paid. Va. Code § 65.1-99. The same inequity would exist if Mr. Williams refused to sign an agreed statement of fact and began working elsewhere, refused medical treatment, refused to report for a medical examination, rejected available work or was declared fit by his own doctor. At the hearing his claim would be rejected, but the employer would be prohibited from recovering the amounts paid. Appellants' argument requires payment until the employee's rights are finally adjudicated. If Mr. Williams chose to appeal he would continue to receive payments long after he returned to work or was otherwise disentitled.

By contrast, if the Commission determines that the termination was premature, Mr. Williams will lose only a few weeks use of the money (App. 37) and may recover a penalty if the employer's conduct so justifies. Va. Code §§ 65.1-75.1 and -101.

To the scales should be added Virginia's amended Rule 13 which protects an employee from arbitrary and frivolous termination by requiring that the employer show an independent reviewing body that there is "probable validity." *Sniadach v. Family Finance Corporation*, *supra*, at 343 (Mr. Justice Harlan concurring). Contrast *Davis v. Caldwell*, 53 F.R.D. 373, 378 (N.D.Ga. 1971).<sup>5</sup>

Finally, it is not acceptable to argue (Appellants' Brief 20-21) that over the long run the losses will be uniformly passed on to society and the individual employer will not be injured. The same rationale would support a denial of compensation for public taking: If enough property is taken over a long enough period of time, the losses would be spread equally and no one would be hurt.

C. THE COURT BELOW WAS CORRECT IN FINDING THAT RULE 13 ADEQUATELY PROTECTS THE EMPLOYEE'S INTEREST.

"Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contest\* \* \* [A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the nature of the burden on that proceeding are all considerations which must be taken in account.

*Hannah v. Lache*, 363 U.S. 420, 442 (1960). Accord, *Cafeteria & Restaurant Workers Union v. McElroy*, 367

<sup>5</sup> "[I]t is clear beyond peradventure that the [Georgia] practice in the workmen's compensation field is immediate termination, with or without notice, upon the slightest suspicion of a change of condition."



U.S. 886, 895 (1961) and *Groppi v. Leslie*, 404 U.S. 496 (1972).

The present Commission procedures afford claimants full due process protection. Before any award is increased or diminished the parties to the award, aided by their counsel, are entitled a full evidentiary hearing on the merits. As in many other states, a vigorous plaintiff's bar has formed to protect the rights of claimants.

In addition to these procedural protections, the Commonwealth of Virginia has provided additional protections for claimants. For example, the Supreme Court of Virginia liberally construes the Act in favor of employees and the Commission limits the employer's or insurer's right to stop payments when a claimant's eligibility is challenged. One such limitation lies in the Commission's power to penalize an insurer or employer for wrongfully withholding payments. A second limitation is Rule 13. Under Rule 13, an employer or insurer can obtain a hearing as to the continuing eligibility of a claimant only if all compensation payments have been paid. Even though, under Virginia law, an insurer or employer loses all rights to challenge a payment once made, the insurer or employer cannot safely suspend payments until the Commission determines "that probable cause exists to believe that a change in condition has occurred" and docket the application.

Petitioners challenge this latter procedure on the ground that insurers and employers have been allowed to make their showings of probable cause in an *ex parte* proceeding. To remedy this perceived violation of "due process", petitioners seek to extend rather than eliminate Rule 13. They do not seek additional notice or an opportunity to appear at the "probable cause" hearing (Appellants' Brief 25). There would, as a matter of Virginia law, be no defenses

which a claimant would raise at this hearing, for the Commission has, in effect, ruled this preliminary hearing is intended to view the employer or insurer's evidence in its best light, much as a "probable cause" hearing under the Fourth Amendment. Cf., *Lindsey v. Normet*, *supra*.

The requested relief would alter the balance Virginia has struck between employers and employees. Employers would be further deprived of their property as a condition to a hearing, and the procedure would encourage claimants to demand hearings even though they were not entitled to further payments, since the pre-determination windfall would be forever theirs. To protect themselves, employers would file premature applications, and hope that claimants would have recovered by the time of the hearing. In short, appellants seek a result which would destroy the established working balance, generate excessive litigation, create employer dissatisfaction and, perhaps, "undermine" the entire system of workmen's compensation. *The Report of the National Commission on State Workmen's Compensation Laws* 100 (1972).

The Virginia legislature, courts and Commission have shown great sensitivity to the needs of employees. There is no evidence of any abuses of the Virginia system, and there exist adequate sanctions to deter arbitrary action. See, *Dillard v. Industrial Commission*, *supra*, at 75 (App. 51).

In upholding the early Workmen's Compensation statutes against employer attack, this Court held that the "states are left with a wide range of legislative discretion, notwithstanding the provisions of the 14th Amendment \* \* \*." *Arizona Copper Co. v. Hammer*, *supra*, at 419. The same answer should be given appellants.

CONCLUSION

For the reasons stated herein and by the Court below, we respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

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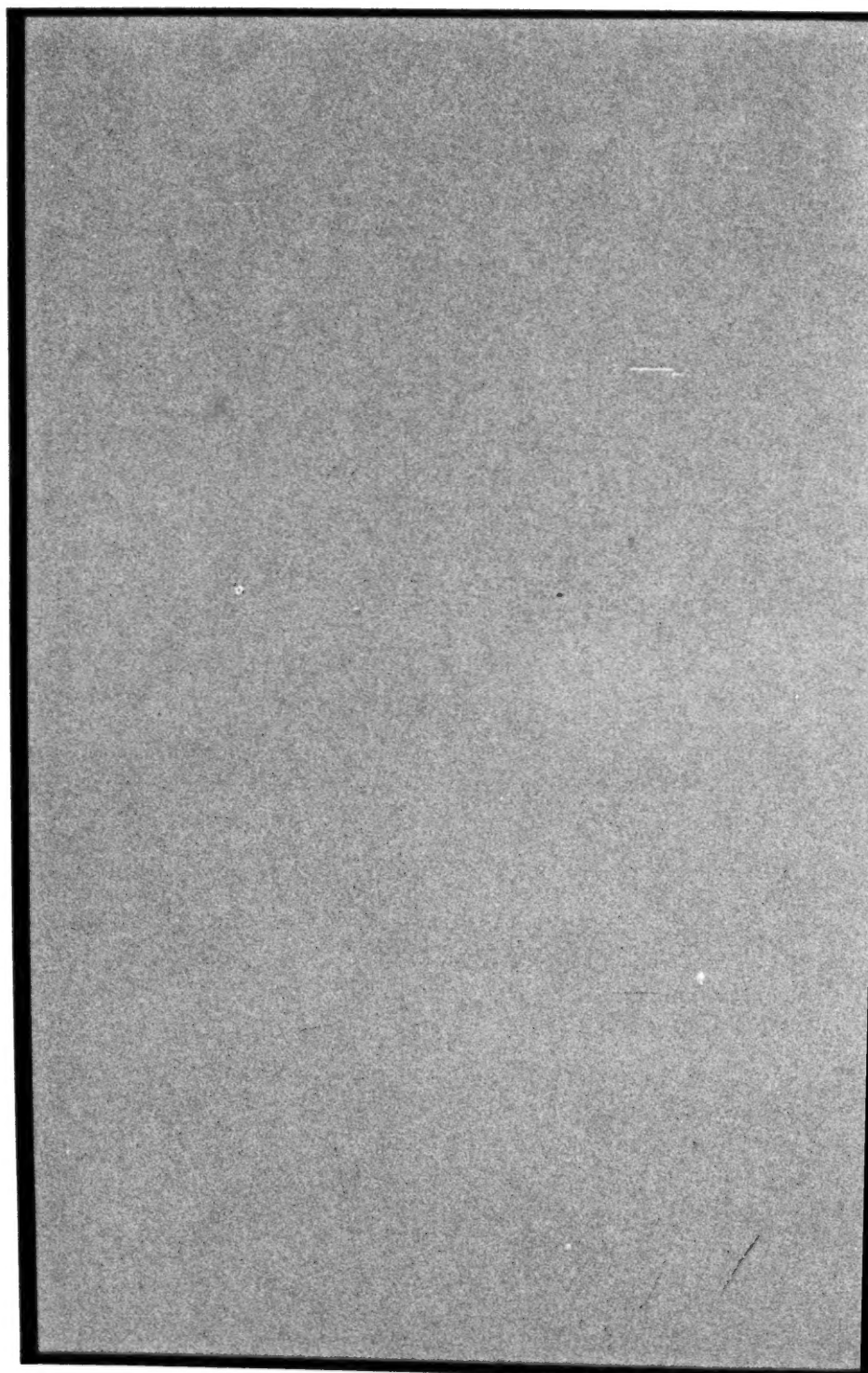
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March 2, 1974

**APPENDIX**



## APPENDIX

42 U.S.C. § 1983, 17 Stat. 13

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

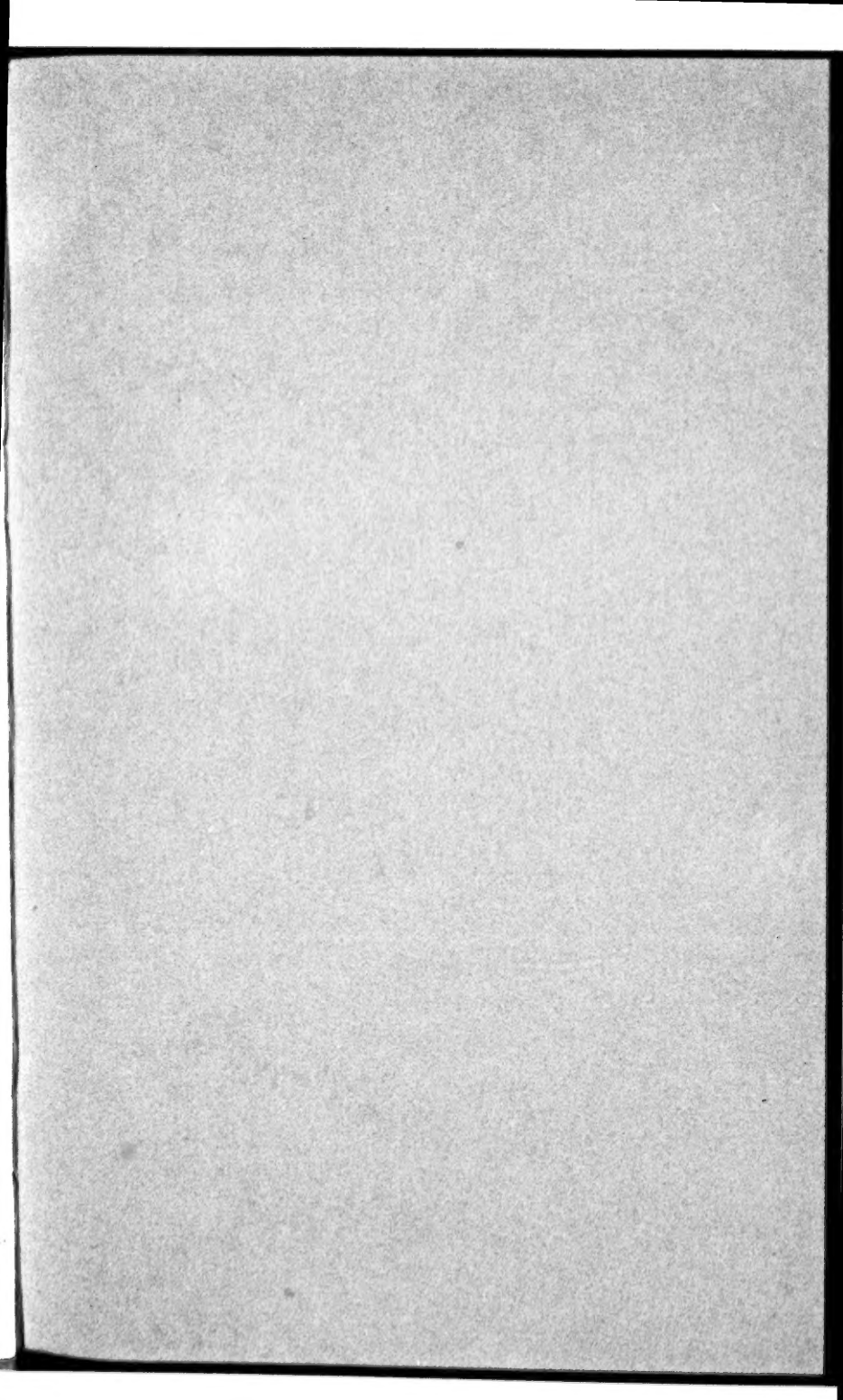
### Section 65.1-100, Code of Virginia of 1950, as amended

*Judgment on agreement or award; enforcement of certain fines and decisions.*—Any party in interest may file in the circuit or corporation court of the county or city in which the injury occurred, or if it be in the City of Richmond then in the circuit or law and equity court of such city, a certified copy of a memorandum of agreement approved by the Commission, or of an order or decision of the Commission, or of an award of the Commission unappealed from, or of an award of the Commission affirmed upon appeal, whereupon the court, or the judge thereof in vacation, shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though such judgment had been rendered in a suit duly heard and determined by the court. The fines imposed and decisions rendered under §§ 65.1-106, 65.1-107 and 65.1-127, shall be enforceable as provided herein for the enforcement of other decisions, orders or awards of the Commission. If such injury occurred outside the State, then such certified copy of the memorandum of agreement, order, decision or award may be filed in the circuit or corporation court of the county or city wherein the same might be brought as an action at law or suit in equity.

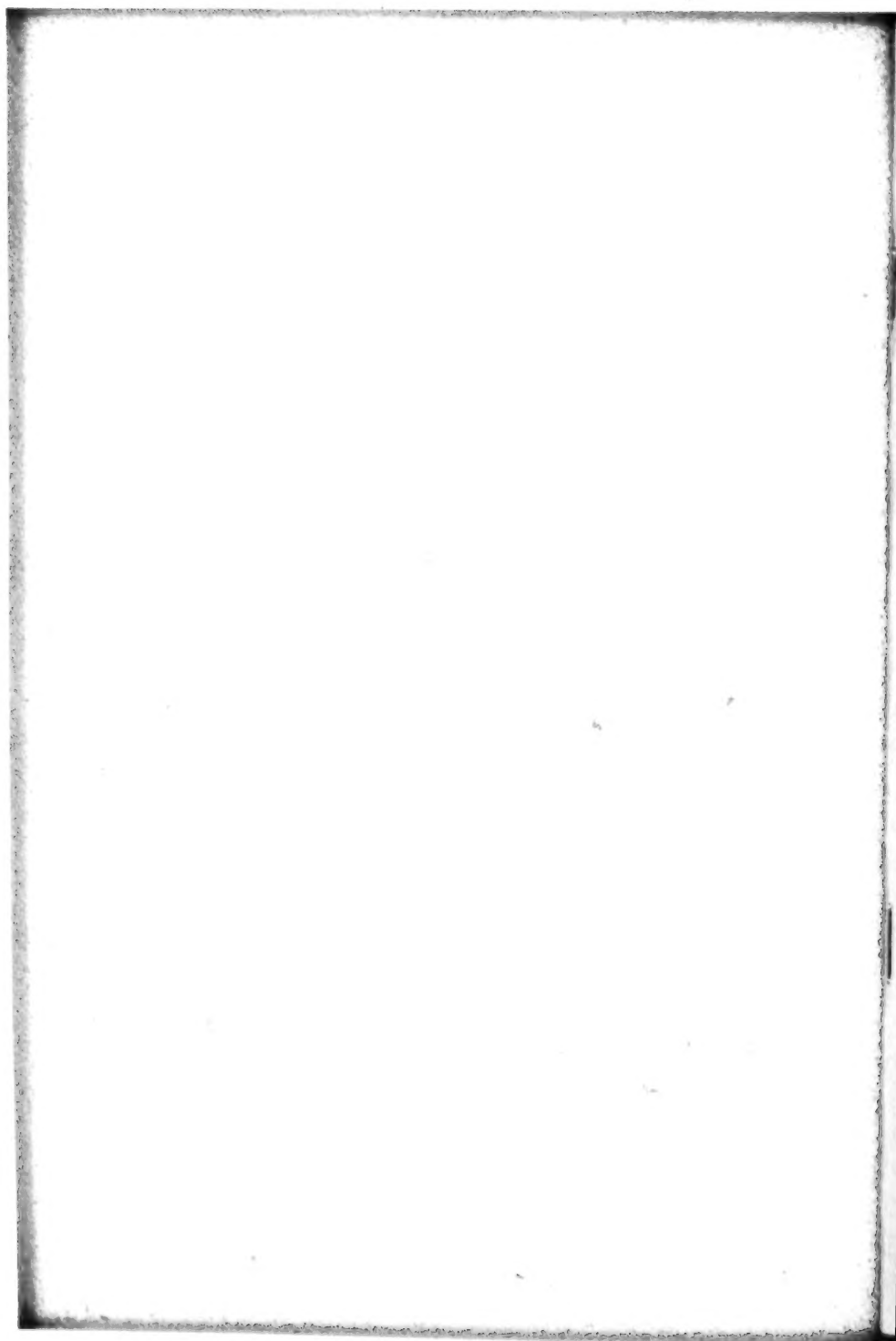
## App. 2

### Section 65.1-101, Code of Virginia of 1950, as amended

*Costs.*—If the Industrial Commission or any court before whom any proceedings are brought or defended by the employer under this Act shall determine that such proceedings have been brought, prosecuted or defended without reasonable grounds, it may assess against the employer who has so brought, prosecuted or defended them the whole cost of the proceedings, including a reasonable attorney fee, to be fixed by the Commission.







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In The

**MICHAEL ROBAX, JR., CLERK**

**Supreme Court of the United States**

October Term, 1973

No. 73-5412

**JOHN R. DILLARD and WILLIE WILLIAMS, individually, and  
on behalf of all other persons similarly situated,**

*Appellants,*

v.

**INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M.  
MILLER, Chairman, Industrial Commission of Virginia,  
M. EDWARD EVANS, ROBERT P. JOYNER, Commissioners  
of the Industrial Commission of Virginia, and AETNA  
CASUALTY AND SURETY COMPANY,**

*Appellees.*

On Appeal From The United States District  
Court For The Eastern District Of Virginia

**BRIEF FOR THE APPELLEES, INDUSTRIAL COMMISSION  
OF VIRGINIA AND INDIVIDUAL COMMISSIONERS**

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On Appeal From The United States District  
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BRIEF FOR THE APPELLEES, INDUSTRIAL COMMISSION  
OF VIRGINIA AND INDIVIDUAL COMMISSIONERS

**QUESTION PRESENTED**

Whether, under the Virginia workmen's compensation scheme, the suspension of compensation benefits by an employer subsequent to an *ex parte* determination by the Industrial Commission that probable cause exists to believe that a change in condition has occurred constitutes a denial of due process of law to an employee receiving compensation.

**STATEMENT OF THE CASE**

The appellees agree in substance with the appellants' statement of the case.

## ARGUMENT

The appellant, Dillard, was to receive compensation benefits "during incapacity" under an award of the Industrial Commission dated April 7, 1971 (Exhibit I, A. 11). The insurer claimed that Dillard was able to return to work as of June 1, 1971, and suspended payments under the outstanding award on June 2, 1971. The Industrial Commission heard the insurer's application on July 16, 1971, and Dillard's compensation benefits were reinstated since the Commission felt that he continued to have incapacity for work. The physician's letter upon which the carrier relied was, at best, prospective in its comment concerning Dillard's capacity to return to work (Dr. Sibley's letter, May 19, 1971, A. 14).

Subsequently, the Industrial Commission amended its Rule 13 (A. 44) to include language which required an employer or insurer to submit applications for change in condition under oath supported by "evidence which constitutes a legal basis for changing the existing award," such evidence to be reviewed by the Commission for the purpose of making a determination that "probable cause exists to believe that a change in condition has occurred."

This administrative determination of "probable cause" under Rule 13 is a prerequisite to acceptance of an application for hearing on the ground of change in condition. The amendment further declared that "benefits shall not be suspended" pending Commission review of the evidence and determination of probable cause to believe a change in condition had occurred.

In essence the relief sought by appellants is that Rule 13, rather than be declared void and unenforceable, be amended to require the continuation of benefits up to the time of hearing (and presumably a final decision) on the employer's

application for hearing.<sup>1</sup> However, in the absence of Rule 13, there would be nothing to prevent an employer or his insurance carrier from unilaterally terminating payment at any time. *Manchester Board and Paper Co., Inc. v. Parker*, 201 Va. 328, 111 S.E.2d 453 (1959).

As the Court below stated, "the very nature of due process negates any concept of inflexible procedure universally applicable to every imaginable situation" (A. 52). The limits of procedural due process must be ascertained by balancing the possible "grievous loss" to the individual against the governmental interest in summary adjudication. "Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action." *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970), citing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), and *Cafeteria and Restaurant Workers Union, etc. v. McElroy*, 367 U.S. 886 (1961). Appellants' simplistic approach by which once having found a "property right," one is inexorably led to conclude that there must be a pre-termination hearing, is wide of the mark. Their argument ignores the fact that there are two "rights" in the same "property," in addition to a substantial governmental interest. An analysis of the workmen's compensation program in Virginia is essential in order to determine the factors which must be weighed so as to judge whether appellants have received "due process."

---

<sup>1</sup> Both Dillard and Williams also pray that defendants be required to resume payments (A. 9 and A. 73, respectively). Presumably, this is no longer in issue. Dillard has settled his claim (A. 24, 25), while Williams has pursued his through the State court system, where the Supreme Court of Virginia denied review (Appellants' Brief, p. 6). Furthermore, Williams' complaint joined neither the employer nor his insurance carrier, at least one of which would be a necessary party if payment were to be ordered.

The first Workmen's Compensation Act of Virginia was adopted in 1918. Acts of Assembly of 1918, Chapter 400. The Act was recodified as Title 65.1 of Vol. 9 of the Code of Virginia (1950), as amended, in 1968. Acts of Assembly of 1968, Chapter 660. Pursuant to the Act, there is provided a system of compensation to an employee, injured in the course of his employment, which is a substitute for common law tort litigation. *Fauver v. Bell*, 192 Va. 518, 65 S.E.2d 575 (1951). No recoupment of payments wrongfully made to an employee is permitted. § 65.1-99 of the Code of Virginia (1950), as amended.<sup>2</sup> Furthermore, the employer is required to be current as to payments when the hearing is requested. Rule 13. The funds paid out under this system are private, not public, as is usually the case in Social Security, unemployment and welfare cases. Accordingly, the Commission has no economic "ax to grind." Rather its purpose is to ensure that the employee's interest is protected, see *Rust Engineering Co. v. Ramsey*, 194 Va. 975, 76 S.E.2d 195 (1953), while at the same time protect the rights of the employer. How, then, does Rule 13 serve this purpose?

The success of the workmen's compensation program in Virginia is based upon "voluntariness"—the voluntary undertaking of payment by an employer promptly after an industrial accident and the voluntary relinquishment by an employee of payments when he is no longer entitled to them. An analysis of the number of cases handled by the Commission bears this out. In the five year period from 1967 to 1971, the Commission approved from 19,000 to 21,000 memorandum of agreements annually.<sup>3</sup> Yet, the number of

<sup>2</sup> Citations to Title 65.1 of the Code of Virginia (1950), as amended, hereinafter will be cited as simply "§ 65.1-....."

<sup>3</sup> Answers to Interrogatories (5) (A. 36).



cases in which the Commission had to resolve disputes in the same five year period was 1,000 to 1,500, annually, where the parties failed to reach agreement in regard to compensation,<sup>4</sup> and 700 to 1,000, annually, where there was disagreement as to the continuance of payments.<sup>5</sup>

In 1973, there were 127,687 accidents reported. Of these only 2,387 opinions were rendered as a result of cases going to hearing.<sup>6</sup> Thus, it is seen that only a small percentage of the cases handled by the Commission involve disputes. Excessive litigation would undermine the entire system, which depends upon voluntary agreements to promptly assume payments and just as promptly terminate them at the appropriate time. See *The Report of the National Commission on State Workmen's Compensation Laws* (1972), pp. 99-100. "... [P]romptness appears to be one of the strengths of workmen's compensation." *Id.* at 118.

The inevitable result of requiring a pre-termination hearing will be the shattering of the delicate structure as it now exists. Since the employer or his insurance carrier cannot recoup benefits paid, it would be in the employee's financial interest to request a hearing even where he knew the employer was clearly right. The employee who was injured can be encouraged to prolong his time off work and be discouraged from rehabilitation if he has a financial incentive to await an evidentiary hearing to terminate his compensation. Conversely, if the employer cannot depend upon voluntary termination of benefits where there has been a change in condition, his cooperation in voluntarily undertaking to commence compensation promptly after an accident will be predictably lessened. So long as the carrier has the right to suspend payments upon a showing of probable cause, he is

<sup>4</sup> Answers to Interrogatories (7) (a) (A. 37).

<sup>5</sup> Answers to Interrogatories (7) (b) (A. 37).

<sup>6</sup> Addendum 1.

not reluctant to commence payments voluntarily. One of the most substantial disincentives to immediate voluntary and continued participation by the insurer would arise from the need for scrupulous investigation of each claim before entering into a memorandum of agreement—the basis for initial award of compensation. Incentive for early initiation of payments comes with knowledge that suspension can be expected to be handled on a voluntary basis. Thus, not only will there be considerably more disputes and hearings with respect to changes of condition and termination of benefits, but there will also be a large increase in disputes and hearings with respect to the voluntary undertaking of payment at the inception of the process. This is clearly not in the employee's best interest. As Judge Merhige said below in dissent: “. . . I cannot help but believe that the average working man in Virginia, who has sustained an injury resulting in a substantial reduction of his weekly income, suffers a grave and *immediate* loss” (A. 63) (Emphasis supplied). Accordingly, anything which postpones the onset of the payments may be extremely detrimental to the employee's interest.

Further, when the protections which are provided for the employee prior to a suspension of benefits are focused upon, it can be readily seen that the employee receives “due process.”

a. Foremost is the requirement that the Commission find “. . . that probable cause exists to believe that a change in condition has occurred.” Rule 13. This is of course a finding by an agency which has no economic interest in the outcome. cf. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

b. Typically, the evidence that is being considered by the Commission is a medical report showing capacity of the employee to return to work. The physician renders an expert

medical opinion and, like the Commission, has no financial stake or bias in the outcome. In fact, the physician will often be one chosen by the employee, since § 65.1-88 provides that an employee may select a physician from a panel of three chosen by the employer.<sup>7</sup>

The opinion of the District Court suggested that the Rule 13 amendment was new and that the results of experience might be relevant (A. 51). A review of cases by the Industrial Commission has shown that this process of administrative determination has proven that the amended Rule 13 procedure is most effective in establishing a low percentage of cases in which the original administrative determination is not upheld upon evidentiary hearing.<sup>8</sup>

c. Appellants argue that Rule 13 is subject to abuse and that the employer can use suspension of payments to force an unfavorable lump sum payment upon the employee.<sup>9</sup> This ignores the fact that such settlement must be approved by the Commission, § 65.1-74. To approve such settlement the Commission must find that it is in the employee's best interest to do so. Rule 14 (Addendum 2). Furthermore, as the Court below pointed out, the employer may be assessed

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<sup>7</sup> Appellants discussed a number of cases which, it is argued, show that a hearing is necessary to resolve disputes (Appellants' brief, p. 24). It is significant, however, that such cases arose in 1971, prior to the amendment of Rule 13 to provide a "probable cause" finding.

<sup>8</sup> A review of 202 cases decided during the period of six months from July 1, 1972, during which time amended Rule 13 was in force, showed that compensation was reinstated in only 17 cases (8.4 per cent) after the evidentiary hearing.

<sup>9</sup> Appellants' brief, p. 23.

costs and attorneys' fees if he acted unreasonably. § 65.1-101 (A. 51).<sup>10</sup>

d. It is important to note that termination without recourse is not being suggested. What is in issue is the *temporary* suspension of benefits with the full right of recovery.<sup>11</sup> The Commission does not enforce its awards. Rather, enforcement is effected by an employee's filing his award or agreement in the Circuit Court of the county or city where the injury occurred and thereby reducing it to judgment. § 65.1-100. During the time that the payments have been suspended, the employee may of course avail himself of this opportunity.

In fact the workmen's compensation scheme in Virginia is (1) heavily weighted toward the protection of the employee and (2) exceeds the requirements of due process.

As previously stated, the employee's interest is, however, not the only one requiring protection. Any moneys given to the employee of necessity must be taken from the employer or his insurance carrier. Thus, there are competing private interests in the same "property." It is appellants' failure to recognize the employer's interest as independent

<sup>10</sup> Judge Merhige questions the effectiveness of such assessments (A. 64). It is submitted that the regular assessment of such fees aids in securing strict compliance. That the Commission is not reluctant to utilize the tool is manifested by the fact that in the same volume of the Opinions of the Industrial Commission discussed by appellants (Brief, p. 24), on no less than eight occasions costs or fees were assessed.

<sup>11</sup> "... the worst possible effect of the procedure which plaintiffs attack as being lacking in due process would be that for a period of a few weeks until a hearing is held a claimant who is finally determined to be eligible for payments would have to live on his accumulated savings or, if he had no savings, would have to resort to relief. If he is eventually found to be eligible he will receive retroactively all the payments to which he was entitled." *Torres v. New York State Department of Labor*, 321 F.Supp. 432, 437 (S.D. N.Y. 1971), *aff'd*, 405 U.S. 949 (1972).

that spells a fallacy in their due process analysis.<sup>12</sup> For the same reason, *Goldberg v. Kelly*, *supra*; *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), on which appellants ground their analysis, are not dispositive of the issue here.

Appellants' statement on page 11 of their brief highlights the error of their position: "They [employers and insurers] are administering funds which the state has directed to be *accumulated* and disbursed according to explicit and detailed statutes and regulations" (Emphasis supplied). On the contrary, there is no *fund* to be administered as in welfare and unemployment cases. The funds are *private*. If they are not spent for workmen's compensation benefits, they can be utilized for any other private purpose. Thus, apart from other distinctions between workmen's compensation and welfare,<sup>13</sup> *Goldberg* is not authority for requiring a pre-termination hearing in this case; in *Goldberg* only governmental funds were involved. Moreover, in *Goldberg* the government was a party to the proceedings in the sense that its funds were involved. Here of course the Commission, as previously stated, has no economic interest and is an unbiased referee.

Likewise, there are major distinctions between the instant case and *Fuentes* and *Sniadach*. In *Fuentes* although the government participated in the repossession of the goods there was no provision for meaningful review by the governmental agency prior to repossession. Additionally, the

<sup>12</sup> Amici on the other hand addresses the distinction: "This Court has never determined whether an evidentiary pre-termination hearing is required, where, as here, there is not 'undisputed ownership,' (*Fuentes*, 407 U.S. at 86), but rather competing private claims to the property in question." Brief, p. 18.

<sup>13</sup> Workmen's compensation is an income maintenance scheme. The individual status with respect to need is irrelevant. Welfare payments are, of course, based upon need.

purchaser clearly possesses a greater property interest in the purchased goods than does the seller. Such is not the case here where there is a contractual claim (albeit sanctioned by law) over which there is a dispute as to whether one party to the contract is entitled to certain benefits. Again, in *Sniadach*, there was no meaningful governmental review prior to the issuance of the garnishment and, again, the person whose "property" was taken had a superior interest to that of the other disputant, who was a creditor seeking to obtain the debtor's wages.

In summary, the Commonwealth of Virginia has conceived a carefully structured and delicately balanced system whereby injured workers are compensated expeditiously and efficiently. The very life blood of the system is found in the resolution of disputes by agreement between employer and employee. Any alteration of the structure in such a way as to substantially increase litigation of claims, either with respect to undertaking payments or of terminating them, will have a deleterious effect upon its operation; and the employee will be the primary victim. It is respectfully submitted that the present state of the law in Virginia provides the best balancing of governmental and private interests so as to ensure that all parties receive "due process."

CONCLUSION

For the foregoing reasons it is prayed that the judgment of the Court below be affirmed.

Respectfully submitted,

INDUSTRIAL COMMISSION OF VIRGINIA

THOMAS M. MILLER, Chairman

M. EDWARD EVANS

ROBERT P. JOYNER

Commissioners

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CERTIFICATE OF SERVICE

I, Andrew P. Miller, a member of the Bar of the Supreme Court of the United States and counsel for the above named appellees, hereby certify that I have served three copies of the foregoing Brief for the Appellees, Industrial Commission of Virginia and Individual Commissioners, on John M. Levy, Esquire and George S. Newman, Esquire, 300 East

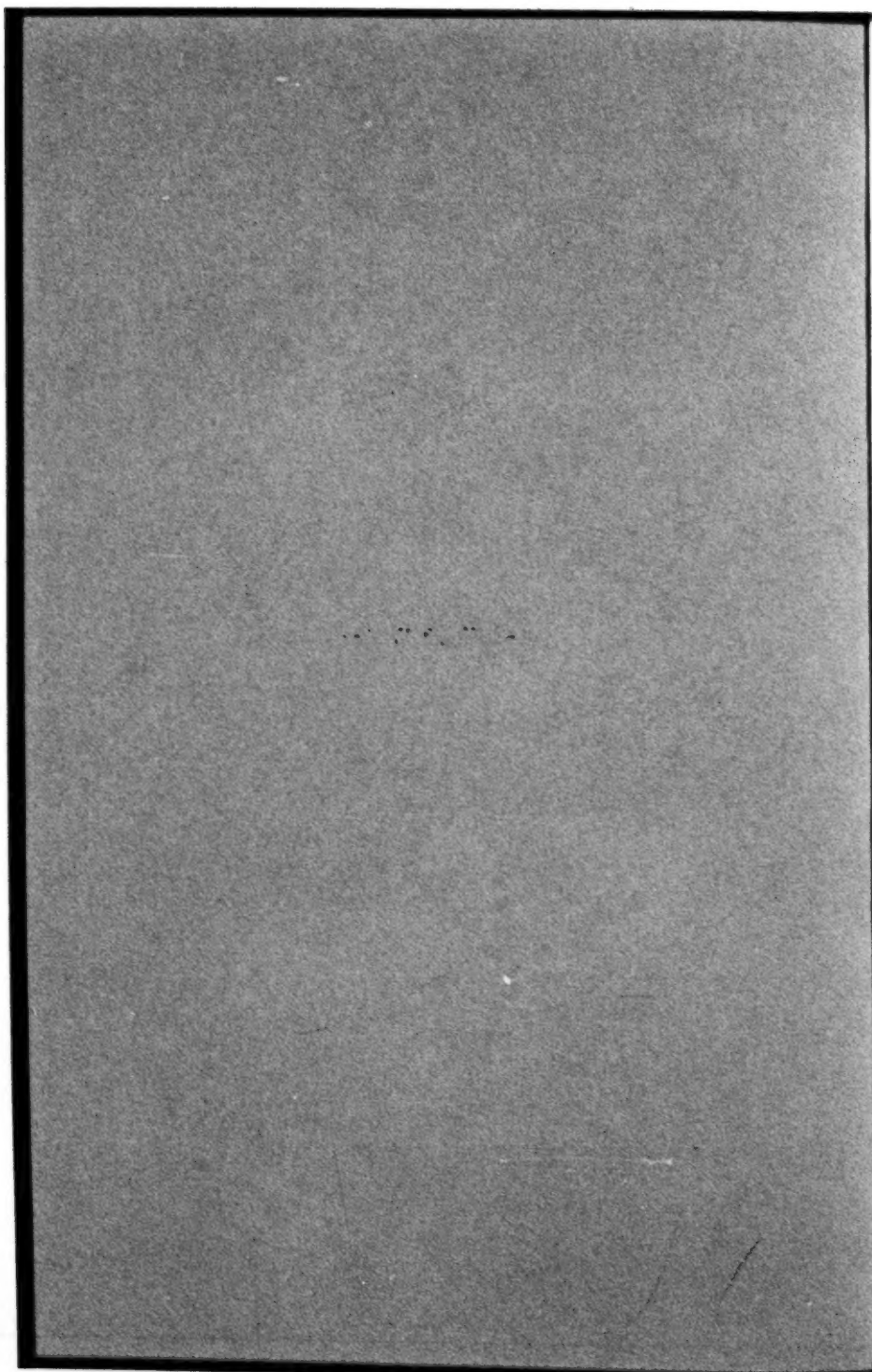
Clay Street, Richmond, Virginia 23219; Willard I. Walker, Esquire, Ross Building, Richmond, Virginia 23219; and J. Albert Woll, Esquire, General Counsel, AFL-CIO, 815 Fifteenth Street, N.W., Washington, D. C. 20005, on or before March 1, 1974. All parties required to be served have been served.

ANDREW P. MILLER

*Attorney General of Virginia*



**ADDENDUM**



Add. 1

ADDENDUM 1

COMMONWEALTH OF VIRGINIA

[LETTERHEAD OMITTED]

DEPARTMENT OF WORKMEN'S COMPENSATION

INDUSTRIAL COMMISSION OF VIRGINIA

P. O. Box 1794

Richmond, Virginia 23214

February 12, 1974

From: Claims Division Of Industrial Commission

This is to certify that the Industrial Commission of Virginia had 127,687 accidents reported which resulted in the creation of 78,446 claim files during 1973.

The Claims Division approved 24,126 agreements and entered awards for same.

There were 2,387 opinions entered as a result of cases going to hearing.

The Claims Division received 1500 applications based on change in condition which were filed by the employers or insurance carriers for the purpose of suspending compensation payments. Under Rule 13 391 of the applications were rejected based on a finding of no probable cause, and 1109 cases were placed on the hearing docket.

C. G. James, Deputy Commissioner  
Claims Division

CGJ:bcw

## Add. 2

### ADDENDUM 2

#### RULES OF THE INDUSTRIAL COMMISSION

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Rule 1. *Hearings*.—A hearing held by the full Commission, a Commissioner, or Deputy Commissioner shall be conducted as a judicial proceeding in that all witnesses shall testify under oath, and a record of the proceedings shall be made. The Commission will not be bound by statutory or common law rules of pleading or evidence, nor by any technical rules of practice in conducting hearings, but will conduct such hearings and make such investigations in reference to the questions at issue in such manner as in its judgment are held adapted to ascertain and determine expeditiously and accurately the substantial rights of the parties and to carry out justly the spirit of the Workmen's Compensation Act; and to that end, hearsay evidence may be received.

The party requesting a hearing or requesting a review shall have the right to open and close, and, upon review, the parties shall be allotted twenty minutes to a side in which to present oral argument.

Subpoenas requested by the parties will be issued by the Commission and sent to the party requesting the same to be by him turned over to the proper officer for execution. The party requesting the subpoena shall be primarily liable for the officer's fee for serving the same.

In accordance with the provisions of § 65.1-94, the original hearing in all cases will be held in the county where the accident occurred. However, for mutual convenience, all parties concerned concurring, they may be transferred to any designated point. All reviews before the full Commission will be held at its offices in the City of Richmond.

Rule 2. *Continuances*.—Postponements of hearings will be granted only when it shall appear that, without the fault

### Add. 3

of the party asking for same, material and irreparable injury may occur. Parties are, therefore, required to make every preparation possible and to appear at the time and place of hearing and proceed with the case.

**Rule 3. *Additional Testimony.***—After the hearing of a case by a Commissioner, or Deputy Commissioner, the opinion and award may be reviewed by the full Commission upon the petition of any party at interest, but no additional testimony will be introduced upon review, and any petition for a reopening of the case and the taking of additional testimony will only be favorably acted upon by the full Commission where it appears to the Commission that such course is absolutely necessary and advisable and also where the party requesting the same is able to conform to the rules prevailing in courts of this State for the introduction of after-discovered evidence.

A formal petition shall be filed previous to the hearing upon review in all cases where such request is made with the Commission and a copy of the same furnished the opposite party, or his attorney. Such petition shall conform to those required in courts upon applications for the introduction of newly discovered evidence.

In no case will a petition requesting a re-opening of a case for the introduction of new testimony be considered, except at the time of the review before the full Commission.

**Rule 4. *Willful Misconduct.***—If the employer or insurance carrier intends to rely upon the defense of “willful misconduct” under § 65.1-38 of the Act, it shall file with the Commission, previous to the hearing, furnishing a copy of the same to the employee or his attorney, a statement of its intent to make such defense, together with a statement of the particular act or acts relied upon as showing willful misconduct.

#### Add. 4

Rule 5. *Posting Notices.*—Every employer within the operation of the Virginia Workmen's Compensation Act shall post and keep posted, conspicuously in his plant, shop, or place of business usually frequented by his employees, notice of his compliance with the provisions of the Act. Such notice may be in writing or in print and shall follow substantially the form prescribed by the Industrial Commission.

Rule 6. *Evidence of Insurance to be Filed with the Commission.*—Every employer within the operation of the Act shall file with the Industrial Commission proof of his compliance with the insurance provisions (§ 65.1-103 and § 65.1-104) of the Act. A notice from the insurer (Form No. 45-F) certifying this fact will be received as acceptable proof.

Rule 7. *Self-Insurance by the State, its Municipalities and Political Subdivisions.*—Permission for self-insurance by the State and its political subdivisions, as well as the municipalities of the State, will be granted, upon application therefor, without submission of proof of financial ability and without deposit of bond or other security. However, provision must be made for the premium tax provided for in § 65.1-135 of the Act.

Rule 8. *Information Concerning Financial Condition of Self-Insurer.*—No record or any information concerning the solvency and financial ability of any employer acquired by a Commissioner or his agent by virtue of his powers under the Virginia Workmen's Compensation Act shall be subject to inspection; nor shall any information in any way acquired for such purposes by virtue of such powers be divulged by a Commissioner or his agent, unless by order of the court, so long as said employer shall continue solvent and the compensation legally due from him, in accordance with the provisions of the Act, shall continue to be paid.

## Add. 5

**Rule 9. *Liability and Requirements of Employer Carrying Workmen's Compensation Insurance.***—Every employer taking out a Workmen's Compensation Insurance Policy, or qualifying as a self-insurer, shall be subject to all the provisions of the Workmen's Compensation Act. This rule applies to all employers, regardless of the number of employees.

All employers shall post and keep posted a copy of this rule, in a place or places conspicuous to his employees. In unusual cases, where such posting is not possible, as where the employer has no fixed place of operation in the State, the rule must be made known personally to the employees affected.

This rule, in so far as it applies to employers who have less than five employees, at the time the Workmen's Compensation insurance becomes effective, shall remain in force only during the period of time covered by said insurance.

**Rule 10. *Employees Subject to Act Unless Rejection Right Exercised.***—Every employee of employers who have complied with the foregoing requirements shall be subject to all the provisions of the Workmen's Compensation Act unless and until he notifies the Industrial Commission of Virginia that he elects not to be bound by the provisions of the Act, in which case the burdens are assumed as provided in § 65.1-44 of the Act.

**Rule 11. *Waiting Period.***—If the employee is not paid wages for the entire day on which the injury occurred, the seven-day waiting period prescribed by the Act shall include the day of injury regardless of the hour of the injury.

All days or parts of days when the injured employee is unable to earn a full day's wages, or is not paid a full day's wages, due to injury, shall be counted in computing the waiting period even though the days may not be consecutive.



## Add. 6

**Rule 12. *Must Pay Awards Direct.***—All compensation due an injured employee or compensation awarded on account of death under the Virginia Workmen's Compensation Act must be paid direct to the beneficiary or beneficiaries. This ruling applies in cases in which the employee is represented by counsel, as well as in cases in which he has no representation.

Compensation awarded must be paid promptly and in strict accordance with the award issued by the Commission. Awards will provide for the attorney's fee in all cases in which the claimant is represented, and the employer or his insurance carrier will be directed to pay the attorney's fee to the attorney direct and to deduct same from the compensation awarded the claimant.

**Rule 13. *Applications for Review on Ground of Change in Condition.***—Applications for review under § 65.1-99 of the Act must be in writing and state the ground relied upon for relief. Reviews of awards on the ground of a change in condition shall be determined as of the date of the filing of the application in the offices of the Commission, except as provided in paragraphs two and three hereof.

All applications for hearing by an employer or insurer under § 65.1-99 shall show the date through which compensation benefits have been paid. No application shall be considered by the Commission until all compensation under the outstanding award has been paid to the date such application is filed with the Commission. Except, that in any case in which the employee has actually returned to work or has refused employment (§ 65.1-63), medical attention (§ 65.1-88), or medical examination (§ 65.1-91), compensation may be terminated as of the date the employee returned to work or refused employment, medical attention or medical examination, or as of a date fourteen days prior to the date the application is filed, whichever is later. In such



#### Add. 7

cases the application will be considered and determined as of the date of return to work, or refusal, or as of a date fourteen days prior to the date the application is filed, whichever is later. All applications by an employer or insurer shall be under oath and shall not be deemed filed and benefits shall not be suspended until the supporting evidence which constitutes a legal basis for changing the existing award shall have been reviewed by the Commission, or such of its employees as may be designated for that purpose, and a determination made that probable cause exists to believe that a change in condition has occurred.

All applications for hearing by an employee on the ground of further work incapacity shall be considered and determined as of the date incapacity for work actually begins, or as of a date fourteen days prior to the date the application is filed, whichever is later.

#### Rule 14. *Compromise Settlements; Lump Sum Payments.*

—All compromise settlement agreements shall be submitted to the Commission in writing in the form of a petition setting forth the matters in controversy; the proposed terms of settlement; the proposed method of payment, together with such other facts as will enable the Commission to determine if the best interests of the claimant will be served by approval thereof.

If the proposed settlement contemplates payment in a lump sum, the petition shall set forth in detail the facts relied upon to show that the best interests of the employee or his dependents will be served thereby.

The petition, prepared by the parties, shall be signed by the claimant and his attorney, if represented, and by the other parties, or their attorneys, and shall be accompanied by an original draft with six copies of the proposed order, properly endorsed.

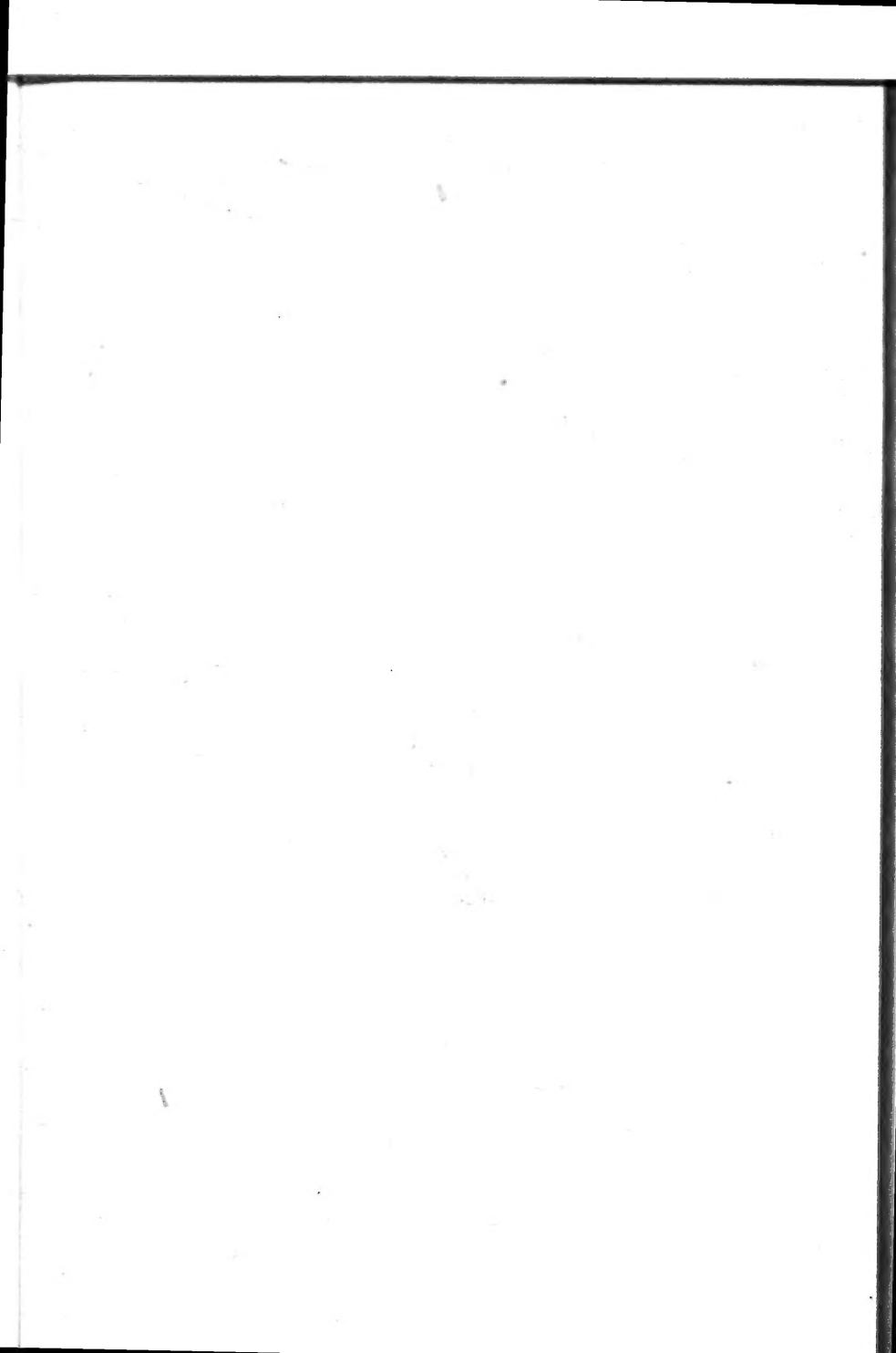
Add. 8

**Rule 15. *Filing of Agreements.***—All written agreements pertaining to the payment or termination of compensation shall be filed with the Commission immediately upon their execution.

**Rule 16. *Advisory Committee.***—An advisory committee to the Industrial Commission is hereby established. The committee shall consist of six members, appointed by the Commission, for terms of three years each. The membership of the committee shall be composed of a representative of: employees, employers, the medical profession, the legal profession, the insurance industry, and the public. The committee shall elect its chairman, and it shall meet at least once each calendar year. A quorum of the committee shall be four members.

**Rule 17. *Required Filing of Medical Reports.***—All medical reports received by any party in any proceeding in the Industrial Commission, shall, as soon as received, be forthwith filed with the Commission. In any contested pending claim copies of such medical reports shall be simultaneously forwarded to the opposing party.

The required filing of such medical report with the Commission shall constitute a required report and subject to provisions of § 65.1-127, Code of Virginia.





SUPREME COURT, U. S.

FILED

MAR 12 1974

IN THE

MICHAEL RODAK, JR., CLERK

**Supreme Court of the United States**

OCTOBER TERM, 1973

No. 73-5412

JOHN R. DILLARD, *et al.*,

*Appellants,*

—v.—

INDUSTRIAL COMMISSION OF VIRGINIA, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

**BRIEF OF  
THE AMERICAN INSURANCE ASSOCIATION AND  
THE AMERICAN MUTUAL INSURANCE ALLIANCE  
AS AMICI CURIAE**

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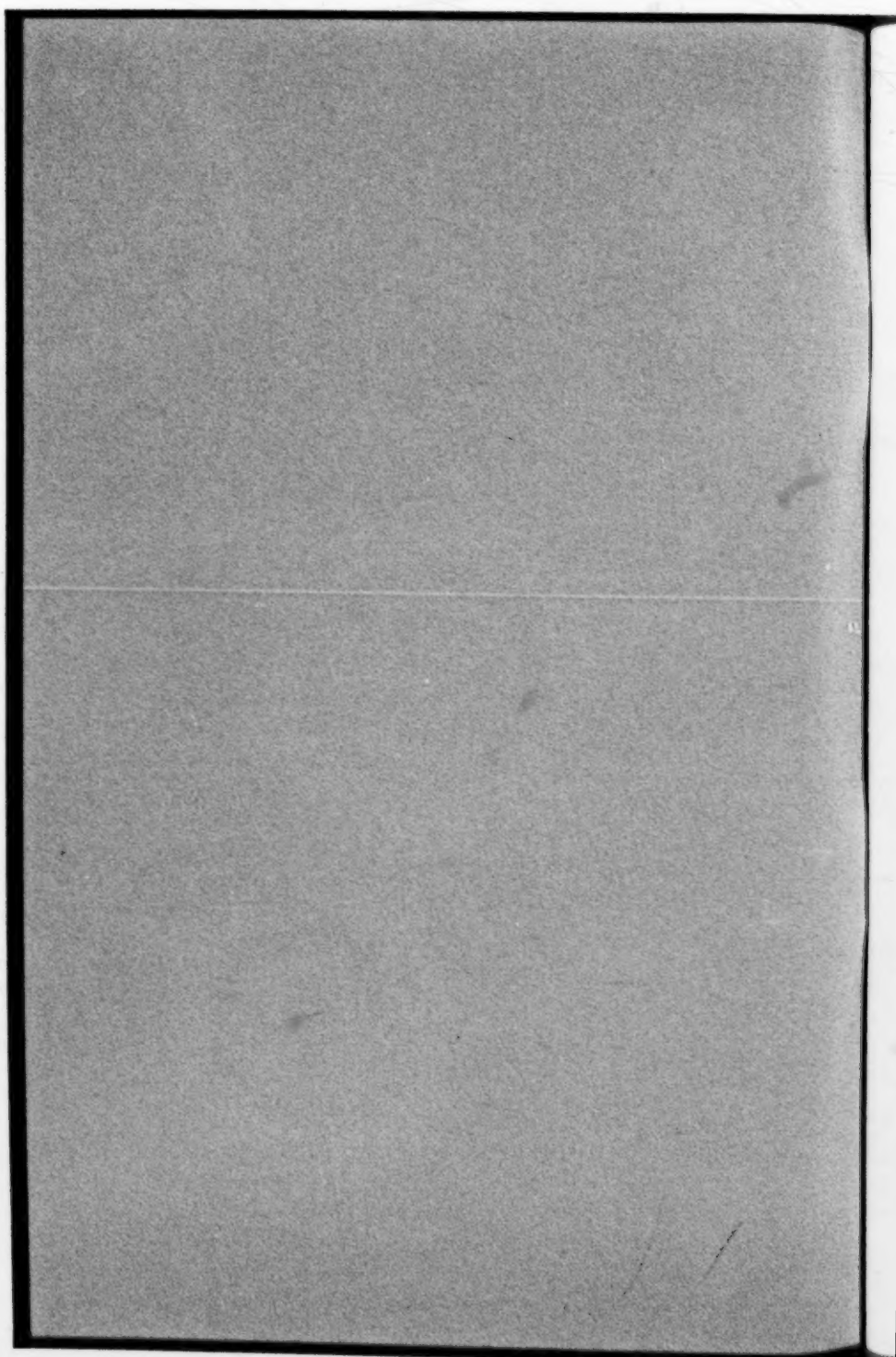
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March, 1974



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1973  
**No. 73-5412**

---

JOHN B. DILLARD, *et al.*,

*Appellants,*

—v.—

INDUSTRIAL COMMISSION OF VIRGINIA, *et al.*,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

---

**BRIEF OF  
THE AMERICAN INSURANCE ASSOCIATION AND  
THE AMERICAN MUTUAL INSURANCE ALLIANCE  
AS AMICI CURIAE**

---

**CONSENT TO FILING**

This Amicus brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of all parties to the case.

## INTEREST OF *AMICI CURIAE*

*American Insurance Association.* The American Insurance Association ("AIA") is an association of 126 stockholder-owned property-casualty insurance carriers. AIA members write approximately 40% of the workmen's compensation insurance in the United States and do business in most States.

*American Mutual Insurance Alliance.* The American Mutual Insurance Alliance ("AMIA") is an organization of more than 100 mutual property-casualty insurance carriers. AMIA members write approximately 35% of the workmen's compensation insurance in the United States and do business in most States.

The decision of this Court in the present case will have a substantial effect upon the existing workmen's compensation contracts written by members of the AIA and AMIA and upon the future workmen's compensation contracts written by AIA and AMIA members. The AIA and AMIA are vitally interested in the satisfactory operation of workmen's compensation systems in order to assure that their members may fully and fairly compensate injured workers with a minimum of delay and unnecessary inefficiency.

## OPINION BELOW

The opinion of the United States District Court for the Eastern District of Virginia below is reported at 347 F. Supp. 71 (1972). It appears in the Appendix ("App.") at pages 46-65.

## JURISDICTION

Probable jurisdiction was noted on December 17, 1973, and the case is before the Court under 28 U.S.C. § 1253.

## QUESTION PRESENTED

Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution require that an employer or his insurance carrier continue workmen's compensation payments in every case pending a full evidentiary hearing, even though the Virginia Industrial Commission, the State agency which supervises workmen's compensation, has found, based upon evidence examined in an *ex parte* hearing, that there is probable cause to believe that the employee involved is no longer eligible to receive workmen's compensation, and even though in the overwhelming majority of cases the employee does not disagree with this finding?

## STATEMENT

The system of workmen's compensation currently utilized in each of the 50 States and the District of Columbia is designed to minimize dislocation to the work force, and to individual workers, from the more than 10,000,000 yearly work-related injuries. See The Report of the National Commission on State Workmen's Compensation Laws 31-32 (1972) [hereinafter cited as National Commission Report]. While no two of these State acts are precisely alike, most of them have similar basic features: they provide for cash benefits, medical care, and rehabilitation services for workers who suffer work-related injuries or diseases. In all but one State, an administrative agency exercises some responsibility over workmen's compensa-

tion claims. In 45 States, the administrative agency adjudicates disputes concerning eligibility for benefits and extent of disability. National Commission Report 32-33.

However, unlike other somewhat similar payment schemes such as welfare and unemployment compensation, workmen's compensation systems for non-governmental employees are entirely privately funded and largely privately handled. Workmen's compensation statutes provide that each employer shall compensate his disabled workmen. The employer usually makes insurance arrangements with a private carrier—often, as noted, an AIA or AMIA member—to meet his statutory obligations. In 32 states, all workmen's compensation insurance is written by private carriers; in 12 states, private and state operated insurance carriers compete; and in 6 states, insurance is provided only by state operated carriers. National Commission Report 33.

However, in all states the moneys actually spent for workmen's compensation benefits are paid by employers, either directly or through premiums to insurance carriers, and, in contrast to welfare and unemployment compensation, do not come out of general or special state or federal contributions.<sup>1</sup> Furthermore, the costs incurred by each employer are directly related to the amount of benefits paid to his injured workers: 80% of employees work for employers who are assessed extra amounts if they have poor safety records. See generally National Commission Report 33.

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<sup>1</sup> In 1970, for example, U.S. employers paid \$4.9 billion for workmen's compensation. Compendium on Workmen's Compensation 6 (1973).

**A. *Background of the Workmen's Compensation System***

Just after the turn of the 20th century, United States industrial injury rates reached an all-time peak. However, it was recognized that tort remedies available under the common law to workers injured or killed on the job, or to their families, were less than adequate. Injured workers found that courts tended to lack sympathy for their complaints and that the defenses of contributory negligence and assumption of the risk, and the fellow servant doctrine, made it difficult to recover from an employer. Furthermore, even where an injured worker could recover, the fact that the compensation system was based upon liability for negligence imposed high legal costs and made for long delays. See National Commission Report 33-34. Indeed, in many instances even an employee who successfully obtained a judgment was unable to collect because the employer was judgment proof.

As a result, the principle of "no fault" workmen's compensation was developed early in the century. The costs of work-related injuries were to be borne by the employer according to a set formula, thus providing prompt and effective compensation to the injured worker without the necessity of wasteful litigation. Furthermore, it was thought that, by making the employer's costs dependent upon his safety record, such a no-fault scheme would promote better safety practices. These objectives were supported by both the National Association of Manufacturers and the American Federation of Labor. As a result, between 1911 and 1920, 42 states passed workmen's compensation statutes similar to the Virginia statute before the Court in the present case. National Commission Report 34-35. Today, as noted, all 50 states and the District of Columbia have workmen's compensation statutes.



According to the study made by the National Commission, workmen's compensation statutes have five principal objectives. These are:

- (1) to provide broad coverage for employees subject to work-related injuries or diseases;
- (2) to provide substantial protection to injured workers against interruption of income;
- (3) to assure sufficient medical care and rehabilitation services;
- (4) to encourage safety by providing economic incentives for each employer to reduce work-related injuries and injuries; and
- (5) to deliver these services as inexpensively and as efficiently as possible. National Commission Report 35-40.

In order to maximize the availability of benefits while keeping costs as modest as possible, as the foregoing objectives require, all workmen's compensation systems have been designed to minimize litigation and the resort to adversary proceedings. As the National Commission noted, excessive litigation results in unnecessary delay, expense, and interference with rehabilitation. National Commission Report 119. The Commission stated that:

"In almost every State, claimants' attorneys' fees are deducted from awards to the workers. Their fees, while reflecting considerable service to employees, are a significant proportion of the total monetary cost of workmen's compensation. Less obvious costs of litigation which affect the performance of the delivery system may be even more substantial. These costs include delays and uncertainties resulting from legalistic jousting over means of determining benefits, as well as the immeasurable cost of interference with or delay of rehabilitation of the disabled. An equally tragic side-effect of litigation is the tendency to polarize



attitudes of labor and management to the extent that both resist reforms that would be to their common advantage.

Workmen's compensation can be undermined by excessive litigation." National Commission Report 100.

The advantages of the present system, which is largely characterized by informal procedures and minimizes resort to adversary proceedings, are evident from the statistics reported by the National Council on Compensation Insurance: in 1972 the private insurance carriers which do most of the underwriting of workmen's compensation returned fully 75.3% of the premium funds expended by employers as workmen's compensation benefits to employees.

In contrast, the former New York system of workmen's compensation (since modified) required a full hearing in every case before benefits could be suspended. This is the type of system that Appellants seek to impose upon all States as a constitutional requirement. The inefficiency and cost of such a system were the major reasons for New York's abandonment of the required hearing procedure. See A. Dawson, Administration of the Workmen's Compensation Law in the State of New York, First Report to Hon. Thomas E. Dewey, in Public Papers of Governor Dewey 456, 458-460 (1954). Similarly, Massachusetts presently has a workmen's compensation system which requires a hearing in almost every instance prior to termination of benefits. The result has been a twelve to eighteen month delay with a backlog (as of 1971) of 8,000 to 9,000 cases. See M. Brooke, Administering Workmen's Compensation Cases in California, Florida, Massachusetts, New Jersey, New York, and Wisconsin in III Supplemental Studies for the National Commission Report 77, 80-81 (1973); National Commission on State Workmen's Compensation Laws, Public Hearings 47, 87 (October 18, 1971).

The inequities and delays which result from the Massachusetts system, and which resulted from the now-abandoned New York system mentioned above, contrast unfavorably with usual prompt resolution of workmen's compensation problems in the vast majority of states which do not require unnecessary formalities. Indeed, for these reasons, almost all states have adopted workmen's compensation systems—of which the Virginia system at issue here is typical—which work largely on a non-adversary basis. For example, under the present New York system, 96.2% of all workmen's compensation claims are resolved without resort to adversary proceedings. State of New York, Workmen's Compensation Board, Carrier Performance 21 (1973).<sup>2</sup>

#### ***B. The Virginia Workmen's Compensation System***

The Virginia Workmen's compensation system has changed relatively little since it was first established in 1918, although it has been amended a number of times, most recently in 1973. 9 VA. CODE Title 65.1 (1950). Workmen's compensation in Virginia is administered by the Industrial Commission, a six member body consisting of three commissioners and three deputy commissioners; it serves as a moderator between employers and employees. The Commission's mission is to protect employees; the workmen's compensation statutes specifically provide that they are to be liberally construed in favor of employees. See, e.g., *Griffith v. Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E.2d 530 (1942). Funds for the system come entirely

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<sup>2</sup> Furthermore, testimony from the nation's second largest workmen's compensation carrier to the National Commission on State Workmen's Compensation Laws indicated that 95% of its claims nationwide were resolved without recourse to adversary proceeding. See Testimony of M. John Bright of the Travelers Insurance Company, before the National Commission (Dec. 13, 1971).

from employer contributions which are managed by the insurance companies writing workmen's compensation insurance in the State. App. 28.

### 1. The Present System

Although in the past an employee could elect whether to proceed under the workmen's compensation system or whether to pursue his common law remedies, as of January 1, 1974, workmen's compensation is compulsory and common law remedies are no longer available to injured workers. Rather, an injured worker is entitled to recover benefits so long as he is disabled. For total or partial disability, these benefits consist of medical payments and cash in the amount of  $66\frac{2}{3}$  percent of the worker's weekly wage or \$80.00,<sup>3</sup> whichever is less, up to a maximum of 500 weeks and \$40,500 (except for total permanent disability in which case there are no upper limits on recovery). 9 VA. CODE §§ 65.1-54, -55, -56, -71.

An injured worker is entitled to begin receiving payment after an award is entered by the Commission, or if the employer and employee agree upon the nature of the award. As described in detail below, most awards are determined by agreement although in order to assure that such agreements adequately protect the employees involved, they must be approved by the Commission. 9 VA. CODE §§ 65.1-93, -94. In actuality, since carriers recognize that long delays in the commencement of compensation payments may work a hardship upon injured employees, payment is usually begun *even before* an agreement is reached or an award is made.

<sup>3</sup> In 1973, maximum workmen's compensation benefits varied from \$56 per week in Kansas and Mississippi to \$175 per week in Alaska and \$167 per week in the District of Columbia. Kemper Insurance Co., Public Affairs Newsletter, Vol. 4, No. 1, p. 2 (February 18, 1974).

Once an award is entered, either by agreement between the employer and the employee, or as a result of the decision of the Commission, the employee receives the amount awarded so long as he remains disabled. As a formal matter, these awards are not self-enforcing. In the event that the employer refuses to pay an award, an employee may petition the Commission or may sue in any circuit court to enforce the award. 9 VA. CODE § 65.1-100. In practice, however, carriers pay Commission awards as a matter of course and there is rarely litigation in such cases. Thus, though an award or agreement approved by the Commission can be enforced by the Commission or the courts, the success of the workmen's compensation program in Virginia, as elsewhere, is based upon informal procedures<sup>4</sup> and the voluntary cooperation of the parties involved.

In the vast majority of cases, agreements are negotiated between the employer or, more typically, his insurer, and the employee. For example, between 1967 and 1971, the Commission approved between 19,000 and 21,000 agreements between workers and employers each year. During this period, the number of cases in which the parties failed to reach agreement (and hence eligibility was determined by decision of the Commission) ranged between 1,000 and 1,500 annually. Thus, approximately 95% of all claims for workmen's compensation were resolved informally by the parties themselves and compensation began virtually immediately. App. 36-37.

A worker is eligible for workmen's compensation payments only so long as his disability remains. Thus, a

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<sup>4</sup>The workmen's compensation statutes require, for example, that the rules of the Commission be as simple as possible. 9 VA. CODE § 65.1-18.

worker who was injured on the job may fully recover and hence no longer be entitled to workmen's compensation benefits. Or he may suffer an injury which, in its long-term effect, is only partially disabling so that he is entitled only to a partial amount of workmen's compensation. In either of these instances, the worker's eligibility for full workmen's compensation benefits ceases. Furthermore, the Virginia system provides that where an employee is permanently disabled, either totally or partially, a lump sum settlement may be reached in place of weekly payments, subject to the approval of the Commission. 9 VA. CODE § 65.1-74.

There are two procedural methods for terminating or modifying an outstanding award (including an award based upon the agreement of the parties). Just as the employer's insurance carrier and the employee typically agree as to the commencement of workmen's compensation benefits, the carrier and the employee usually concur when the employee's condition has improved and the award should be terminated (in the event that the employee has fully recovered) or decreased (in the event that the employee has partially recovered). Most workers treat the system fairly and, when they are able to go back to work, do so and cease to collect payments. Thus, during the period from 1967 to 1971, the State of Virginia had only between 700 and 1,000 cases per year in which the employer and the employee disagreed as to the continuance of payments out of approximately 20,000 cases each year. Thus, approximately 95% of payments of workmen's compensation are terminated by agreement. App. 36-37.

Alternatively, in those relatively few instances where no agreement is reached between the employer and employee as to the cessation of payments, the employer or insurance

carrier petitions the Commission to revoke its award. The formal revocation of the award occurs only after a full trial-type hearing on the merits, the sufficiency of which is not at issue here. As noted, there are approximately 700 to 1,000 of these hearings per year, held in the county in which the injury occurred—that is, where the employee worked (in order to minimize the inconvenience to the employee). 9 VA. CODE § 65.1-94.

Under the Virginia workmen's compensation system, an employer or his insurance carrier which overpays, or which pays monies to an ineligible employee, has no right of recoupment. 9 VA. CODE § 65.1-99. In view of the denial of recoupment, for many years prior to the adoption of the present Rule 13 insurance companies and employers simply suspended payments in those instances where they believed that an employee was no longer eligible for benefits. If it was later determined at the revocation hearing that the employee was not in fact eligible for compensation, the award was revoked and the employer or his carrier had not made excess and nonrecoverable payments. On the other hand, if the employee was still eligible for compensation, the employer would be required to make back payments, as well as to continue future payments.

However, there was concern in Virginia that the old system created pressures to suspend payments in some instances when perhaps they ought not to have been. This caused hardships to some injured employees whose payments were stopped temporarily until reinstated after a later hearing. The present Rule 13, as described in detail below, was adopted precisely to avoid any possibility of improper suspension of payments in even a few cases.



## 2. Rule 13

On March 21, 1972, in part because of the experiences of Mr. Dillard, one of the plaintiffs herein, and in order to further protect injured employees by assuring that payments would not be improperly suspended by employers or insurance carriers, the Commission revised its Rule 13. Rule 13 now provides that an employer or carrier may not suspend payment of workmen's compensation—even though it may believe that a claimant is no longer eligible to receive benefits—until such time as the employer or carrier files with the Commission its evidence indicating that the employee is no longer eligible, and until such time as the Commission passes upon that evidence *ex parte* and determines that there is probable cause to believe that the employee is no longer eligible.

Rule 13 operates as follows. When a carrier believes an employee is no longer eligible to receive all or some workmen's compensation benefits but the employee will not agree to a termination of benefits, the carrier files an application for review with the Commission. As a general practice, a copy of the application is furnished the employee. The application for review must be verified by the insurance company and supported by appropriate accompanying documents, *e.g.*, doctor's medical report, employer's letter indicating resumption of employment, etc.

Once the application is received, it is processed within a few days by the Deputy Commissioner for Administration, who is required to be an attorney, or by his assistant. An employee may, under the present Rule 13, file a written statement or submit evidence opposing the probable cause determination. However, in fact this rarely occurs because the employee normally does not have access to the employer's evidence and because the Commission acts rapidly

without waiting to receive any submission from the employee. (However, if an employee does send in information even after probable cause is found, the Commission will evaluate the information. If the information indicates that payment should not be suspended, the Commission informs the carrier and the carrier then continues payments to the claimant).

If, on the basis of the application, and the accompanying evidence, probable cause for termination of eligibility is found, the carrier may suspend its payments. If no probable cause is found, the employer or carrier is required to continue payments. In about one-third of the cases, the Commission finds no probable cause; in the remaining two-thirds of the cases, probable cause is found.

The employee has a right to a full hearing on the question of the termination of the compensation award if probable cause has been found and often exercises that right. The adequacy of that full hearing is not at issue here. In those instances in which such a full hearing is later held, the probable cause determination is almost always affirmed. Of a sample of 202 cases, all involving applications filed after the adoption of the revised Rule 13, in which probable cause had been found at the *ex parte* hearing, 185 employees were found ineligible after the full hearing. Thus, the Commission's probable cause finding was affirmed after the full hearing in 91.6% of the cases. State Br. 7 n. 8.

The Commission uses the following guidelines in determining whether there is probable cause to believe that an employee is no longer eligible to receive workmen's compensation:



1. When the reason alleged for ineligibility is that the employee is able to return to work but refuses, the employer's application must be accompanied by a doctor's report indicating ability to return to work. The doctor's medical report must indicate that the employee can return to work within seven days; speculation as to the employee's condition further into the future will not support a probable cause finding. If the case is borderline, then the Commission examines the whole medical record to determine if there is probable cause.

2. When an employee has in fact returned to work but will not so acknowledge in a written statement and hence continues to draw compensation, the application from the employer or insurance carrier should be accompanied by a letter from the employer indicating when the employee returned to work. However, the Commission will also accept the insurance carrier's affidavit that the employee has returned to work. In this case, probable cause for change of condition is found.

3. When the employer or insurance carrier alleges that the employee is able to return to work on a restricted basis, two factors are required for a probable cause finding. First, there must be a doctor's report which outlines what restricted kind of work the employee can do. Second, the carrier must find the employee an appropriate job consistent with the doctor's report.

4. When the ground alleged for lack of eligibility is that the employee refuses medical attention, the employer must show that appointments have been arranged with the employee's doctor and the employee has not appeared or has refused to cooperate with the doctor. The Commission requires the doctor's statement to this effect, not

just the carrier's. In determining probable cause, the whole file is examined. If the employee has kept his appointments before, then probable cause will not be found. If there is a history of not keeping appointments, however, then probable cause will be found.

5. When the carrier's application is based on the allegation that the employee cannot be located, then the case is automatically put on the docket for hearing and probable cause is found. However, if the employee makes his whereabouts known, either by appearing for the hearing, or in advance of the hearing, then the company must reinstitute payment immediately.

When probable cause is found—which, as indicated, occurs in about two-thirds of the cases—the case is docketed for a full trial-type hearing before a single Commissioner or Deputy Commissioner on the issue of whether the award should be terminated. Decisions of a single Commissioner are appealable to the full Commission and then to the Virginia Supreme Court of Appeals. It should be noted that many cases in which probable cause is found never reach the hearing stage either because a settlement is made between the parties or because the claimant signs a release of the award. Furthermore, as the foregoing statistics indicate, of those cases that do go to hearing, some 91.6% of the probable cause findings are sustained. It is thus clear that the *ex parte* Rule 13 procedures do provide for a careful governmental examination of the situation, and result in significant protection for the employee against any possibility of unfair or improper termination of workmen's compensation benefits. Cf. *Manchester Board and Paper Co. v. Parker*, 201 Va. 328, 111 S.E.2d 453 (1959).

It is equally evident that the Virginia workmen's compensation system functions effectively in providing prompt

benefits to injured workers because of its essentially voluntary nature. Employers and their insurance carriers commence payments promptly, without requiring a finding of eligibility by a formal hearing, because they understand that, at the other end, when the Commission finds that there is probable cause to believe a worker is no longer eligible, they may suspend payments pending a full hearing. Requiring greater formality before payments may be suspended will likely in practice mean more formalities before employers will commence payment in the first place. Such entrenchment of formalities will make workmen's compensation more expensive and less effective than it is now, and ought to be avoided. See National Commission Report 100.

***C. The Cases of Messrs. Dillard and Williams***

*Mr. Dillard.* Mr. Dillard's situation, wherein his workmen's compensation payments were twice suspended by the unilateral action of his employer's insurance carrier and twice reinstated by the Commission upon hearing, is fully described in Appellants' Brief, pages 4-5. We agree with Appellants that a workmen's compensation system should protect against unjustified suspensions of benefits. However, we believe that the present procedures under revised Rule 13 do just that.

It should be noted that both suspensions of Mr. Dillard's payments occurred in 1971, prior to the adoption of the present Rule 13 by the Commission. Indeed, as pointed out earlier, the new Rule 13 was adopted precisely to assure that situations like Mr. Dillard's did not arise again. Thus, under the Commission's current procedures, described in detail above, an employer cannot suspend payments until the Commission finds probable cause to believe that the employee is no longer eligible for workmen's compensation

benefits. Furthermore, it is clear that under the present Rule 13 the Commission would not have found probable cause based upon the evidence acted upon by Mr. Dillard's employer's carrier. See App. 13-16. Hence the Commission would not have permitted the suspension of Mr. Dillard's payments had the present Rule 13 been in effect during the pendency of Mr. Dillard's case.

*Mr. Williams.* Mr. Williams' situation is different, in that his case was processed under the new Rule 13. The facts are described in full in the Appellants' Brief at page 6. In short, Mr. Williams was receiving workmen's compensation when his employer's carrier filed a request with the Commission to revoke the award on the ground that Mr. Williams was no longer eligible to receive compensation. In accordance with the new Rule 13 procedures described above, the Commission held an *ex parte* hearing and on October 13, 1972, it determined that there was probable cause to believe that Mr. Williams was no longer eligible.

According to the Rule 13 procedures, Mr. Williams' carrier could suspend payments as of this date, and a full revocation hearing was scheduled. However, for some reason which does not appear in the record, the carrier had in fact suspended Mr. Williams' payments on October 11, before the probable cause determination and in violation of Rule 13. App. 71-72. When the Commission was informed of this violation of Rule 13, it ordered that Mr. Williams' payments be reinstated, which they were. However, on April 17, 1973, after another probable cause proceeding, Mr. Williams' benefits were again suspended, this time in conformity with Rule 13. Upon a full hearing thereafter, the Commission affirmed the probable cause finding and held that Mr. Williams was no longer eligible to receive

compensation. The Virginia Supreme Court of Appeals declined to review the Commission's judgment, which is final and not in dispute here.

## ARGUMENT

We do not deal here with Appellants' contention that workmen's compensation benefits are a property right sufficiently important to eligible employees to warrant the application of the requirements of the Due Process Clause of the Fourteenth Amendment to a termination or suspension of such benefits. Assuming that Appellants are correct as to these contentions, they have merely stated the question involved here, not answered it, for due process involves "differing rules of fair play" in different situations. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Board of Regents v. Roth*, 408 U.S. 564 (1972). Appellants misconceive the thrust of this Court's prior decisions when they insist that nothing short of a full evidentiary hearing in every case prior to the suspension of benefits will satisfy the requirements of due process. Because, as the prior discussion indicated, only a very small percentage of cases are disputed, the requirement of a full evidentiary hearing in every case would impose vast amounts of unnecessary litigation. Such a result would be disastrous to the proper operation of the workmen's compensation system. We believe that, as the description of Rule 13 and of the workings of the Industrial Commission of Virginia set forth above pointed out, the procedures at issue here do afford due process under the factual circumstances present.

### The Commission's Present Procedures Satisfy the Requirements of Due Process

The decisions of this Court have made it clear that different types of process are "due" in different cases, depending upon the interests at stake and the factual circumstances. There is no single hard and fast rule as to the procedures necessary in each instance. Compare *Goldberg v. Kelly*, 397 U.S. 254 (1970), with *Richardson v. Perales*, *supra*. Thus, we start from the principle that

"The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interests. . . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . . '[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' . . . [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action." *Cafeteria and Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 894-95 (1961). See also *Goldberg v. Kelly*, *supra*, 397 U.S. at 262-63; *Hannah v. Larche*, 363 U.S. 420, 440, 442 (1958); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

One recent decision of this Court aptly illustrates this rule. In *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), the question of due process arose in the context of a limitation upon a person's right to the unrestricted enjoyment of disputed property where it was contended that

the property did not in fact belong to the person involved. This Court held that to satisfy the requirements of due process there must be procedures

“which are aimed at establishing the validity, or at least the probable validity, of the underlying claim . . . [in dispute] *before* . . . [a person] can be deprived of his property or its unrestricted use.” *Sniadach v. Family Finance Corp.*, *supra*, 395 U.S. at 343 (1969) (Harlan, J., concurring).

While *Sniadach* involved the garnishment of a debtor's wages and hence *Sniadach's* property interest in his money was arguably greater than the Appellants' interest in receipt of workmen's compensation in the present case, we believe that the procedures at issue here fully comply with the requirements of *Sniadach*. Indeed, as the earlier description of the present Virginia procedures made clear, it is precisely a determination of “the probable validity” of a workman's claim for eligibility—that is, a determination of probable cause to believe that the person involved is not eligible to receive compensation—which is required under the Virginia procedures before payments can be suspended by an employer.

In our view, a comparison of the factual circumstances present and the procedures utilized in the present case with those in *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Goldberg v. Kelly*, *supra*, upon which Appellants seek to rely, demonstrate that the lower court's finding that due process requirements have been satisfied here is correct and perfectly consistent with *Fuentes* and *Goldberg*.

*Goldberg v. Kelly*, *supra*, involved State welfare payments, out of State and federal funds. In *Goldberg*, New York welfare recipients had had their financial aid ter-



minated without any prior protective procedure at all,<sup>5</sup> supposedly because the State needed to act promptly to prevent unauthorized payments. Thus, against the welfare recipient's need for welfare payments was set the "countervailing governmental interests in conserving fiscal and administrative resources." 397 U.S. at 265. This Court found that the governmental interests asserted could not outweigh the interests of welfare recipients and that, while no judicial or quasi-judicial pretermination hearing was required, welfare recipients were entitled as a matter of due process to a meaningful, if informal, opportunity to have the merits of their termination evaluated prior to having their welfare halted. 397 U.S. at 266-68.

In *Fuentes v. Shevin*, *supra*, defendants had sold plaintiff goods under a conditional sales contract and when a dispute arose, utilized a writ of replevin summarily to seize the goods from plaintiff's home. The procedures under the statutes there at issue provided no means whatever of protecting the plaintiff's interest prior to the seizure of the property from plaintiff's possession. The court which issued the writ was not required to, and did not, examine the support for the seizure:

"[N]o state official participates in the decision to seek a writ; no state official reviews the basis for a claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the . . . [party seizing the goods] provide any information to the court on these matters. The state acts largely in the dark." 407 U.S. at 93.

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<sup>5</sup> During the course of the litigation, the State amended its procedures to provide for a hearing before the caseworker who recommended the cutoff. The caseworker was supposed to present both the welfare recipient's case against termination and the State's case in favor of termination to the supervisor who made the termination decision. 397 U.S. at 257-60.



In fact, as the majority opinion in *Fuentes* pointed out, there was not even a requirement that the defendants make a convincing showing that they were entitled to the goods before they seized them. 407 U.S. at 67-68.

The distinctions between the present case and *Goldberg* and *Fuentes* are evident: *First*, in the present case, there were significant procedures designed specifically to protect Appellants and other employees whose entitlement to continued workmen's compensation benefits is in dispute. These procedures involved a thorough review by the Virginia Industrial Commission based upon medical or other appropriate evidence submitted in a form specifically approved in *Richardson v. Perales, supra*, 402 U.S. at 403-05. Thus, there is no possibility of the Commission "acting in the dark," as in *Fuentes*, or not acting at all, as in *Goldberg*. The fairness of the procedure at issue here for employees is placed in proper perspective when it is recognized that the Commission is an arbiter of disputes between employers and employees. The Commission has no particular interest in supporting employers as against employees; indeed, it is designed to protect employees and required by statute to favor them. *Griffith v. Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E.2d 530 (1942). Furthermore, unlike the case in *Goldberg*, the Commission is not dispensing its own money to recipients of workmen's compensation. Thus, unlike the situation in *Fuentes* and *Goldberg*, there is no question as to any institutional bias of the Commission against employees' claims.

*Second*, in the present case an insurance company or employer may suspend its workmen's compensation payments only after the Commission has found "probable cause" to believe that the employee is no longer eligible to receive workmen's compensation. The Appellants' at-

tempt to suggest that "practical considerations" weigh in their favor because an employer will always serve its self-interest by suspending payments (Br. 22-23) thus misses the point. An employer cannot suspend payments unilaterally—it must await a determination of probable cause by the Commission. This is precisely the due process "convincing showing" of the merits of the employer's claim required by Justice Steward in the majority opinion in *Fuentes*, 407 U.S. at 73-74, and the due process showing of "probable validity" of the employer's claim required by Justice Harlan in his concurrence in *Sniadach*. 395 U.S. at 343. Thus, unlike *Fuentes* and *Sniadach*, there is no question here of a delegation of the power to control the procedure to the private party involved.

The AFL-CIO, as Amicus Curiae herein, asserts that under the current Virginia procedures, the employer "is not required to show a likelihood of success on the merits" in order to suspend payment. AFL-CIO 14. This contention is based, purely and simply, upon a misunderstanding of the Virginia procedures. As our brief makes clear, an employer is required to demonstrate "probable cause" that the employee is not eligible for further benefits—which is precisely a showing of the likelihood of success on the merits—before payments may be suspended. Furthermore, the statistics set forth above at page 14, *supra*, make it clear that the showing required to demonstrate probable cause is significant: in fully one-third of the cases the Commission does not find probable cause. Moreover, in 91.6% of the cases in which probable cause is found by the Commission, the employer prevails at the full hearing thereafter. It is hard to imagine what more could be necessary to show likely success on the merits than a procedure in which the party prevailing at the initial proceeding prevails upon a later full hearing in 91.6% of the cases.

*Third*, unlike *Goldberg v. Kelly, supra*, the interests involved here are tripartite. Thus, this Court is not weighing the interests of welfare recipients in receiving their minimum allotments against the State's interest in efficiency. Rather, here we have two private parties with competing and equal property interests at stake. We do not contest that recipients of workmen's compensation have a meaningful interest in their contractual right to receive payments so long as they are eligible. Nor do we underestimate the fact that in many cases the employee's need for funds may be pressing, although obviously a temporary suspension of benefits does not contain the same potential for harm as a permanent revocation of benefits. *Sampson v. Murray*, 42 U.S.L.W. 4221, 4230 (decided February 19, 1974). On the other hand, it cannot be disputed that employers have an equally important right that their moneys be utilized to pay for benefits to persons who are actually disabled.

In addition, the State has an interest here—the interest in running an efficient and humane workmen's compensation system which assures the maximum benefits to injured workmen with a minimum of delay and at a minimum of cost. There is no doubt that the State's interest here in minimizing inefficiency and expense is legitimate. *Richardson v. Perales, supra*, 402 U.S. at 406. Furthermore, the State's interest here is shared by employees at large, for the greater the amounts of money paid to persons not actually disabled, and the greater the administrative expenses and inefficiencies in the workmen's compensation system, the less money will be left to distribute to injured workers as a group and the greater the delays in payments will be.

Thus, the balancing of interests involved here is very different than that in *Goldberg*. It does not advance the discussion to maintain simplistically that because the employee has an important right, the employer's interest is to be disregarded. Rather, both the employee's and employer's rights, as well as the State's interest and the interest of employees in general, must be considered.\*

Appellants' major argument is that they are entitled to a full evidentiary hearing in place of the present more summary Rule 13 procedures before benefits may be suspended by employers. This is so according to Appellants because the issues considered "often involve conflicting and highly technical evidence" which can only be adequately ascertained at an evidentiary hearing. Br. 23-24. In fact, Appellants claim that the improper suspension of Mr. Dillard's benefits resulted from a misinterpretation of the evidence and that such problems can only be cured by a full evidentiary hearing in every case. Br. 24.

We believe that Appellants' contentions in this regard are not well taken. As we pointed out at page 17, *supra*, Mr. Dillard's case was processed *before* the present procedures under revised Rule 13 were in effect. Hence Mr. Dillard was not given the protection of the present Rule 13; had he been given that protection, he would never have had his benefits suspended because the evidence would not have supported a probable cause finding under present procedures. App. 13-16. Thus, the erroneous suspensions in Mr. Dillard's case stemmed not from the lack of an evi-

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\* We believe, along with the Amicus Curiae AFL-CIO (AFL-CIO 22), that the foregoing analysis demonstrates that the present case is entirely distinguishable from the cases now pending before this Court with respect to termination of State-funded unemployment compensation benefits. See *Crow v. California Department of Human Resources Development*, No. 73-1015; *Fusari v. Steinberg*, No. 73-848.

dentiary hearing, but from the lack of any procedure at all—a problem which has been cured by the present Rule 13.

More important is Appellants' misconception of the nature of the evidence involved in probable cause hearings. As our earlier discussion indicated, pages 15-16, *supra*, there are three types of cases in which probable cause is found. In one type, the employee has returned to work but refuses to agree to the end of compensation. The factual determination—whether the employee has or has not returned to work—in such instances is precisely the pro forma and simple type referred to by Mr. Justice White in his dissent in *Fuentes v. Shevin*, *supra*, 407 U.S. at 100. In the second type of case, the employer simply cannot locate the employee, and so swears. The factual determination here is uncontested, for if the employee appears or is located, he is entitled to benefits. In the third, albeit most frequent, type of case, the factual determination is a medical one as to the employee's fitness, and is made based upon medical reports, a practice specifically upheld by this Court in *Richardson v. Perales*:

“Courts have recognized the reliability and probative worth of written medical reports even in formal trials . . . . [T]he decisions . . . demonstrate traditional and ready acceptance of the written medical report. . . . There is an additional and pragmatic factor which, although not controlling, deserves mention. This is . . . ‘[t]he sheer magnitude of that administrative burden,’ and the resulting necessity for written reports without ‘elaboration through the traditional facility of oral testimony.’” 402 U.S. at 405-06.

Finally, Appellants' contention that every case requires a full hearing misreads this Court's holdings. It has never been held that, whatever the nature of the process

found to be "due" in a particular factual circumstance, a hearing must be given in every case. Rather, even the most expansive of this Court's decisions have required only that a person be given an *opportunity* to obtain the required due process hearing prior to the suspension of benefits. See *Goldberg v. Kelly*, *supra*; *Fuentes v. Shevin*, *supra*. It has never been maintained that a full hearing must be supplied even to persons who do not dispute the governmental action involved, and who indicate no interest in having such a hearing. In short, whatever process is required must be made available only to those who wish to take advantage of that process. Thus, even if something more formal than the present Rule 13 procedures were to be required by due process, that "something more" would be necessary only in those instances where the employee indicated an interest in such procedures. A rule requiring a hearing in every case would exalt form over substance and would needlessly burden governmental agencies and the parties by making them go through unwanted formal procedures for persons who have no interest in contesting the action involved.

As this Court has held, determining whether a particular procedure satisfies the requirements of due process ultimately "comes down to the question of the procedure's integrity and fundamental fairness." *Richardson v. Perales*, *supra*, 402 U.S. at 410. Integrity and fundamental fairness do not always require a full evidentiary hearing. We submit that, in view of the type of factual determinations made in probable cause hearings, such hearings may properly be resolved upon affidavits and medical reports rather than only after an evidentiary hearing. Furthermore, we believe that the analysis herein demonstrates that, based upon the facts of this case and considering the interests involved and the procedures used by the Virginia Industrial Commission, the revised Rule 13 here at issue satisfies the requirements of due process.

## CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the Eastern District of Virginia should be affirmed.

Respectfully submitted,

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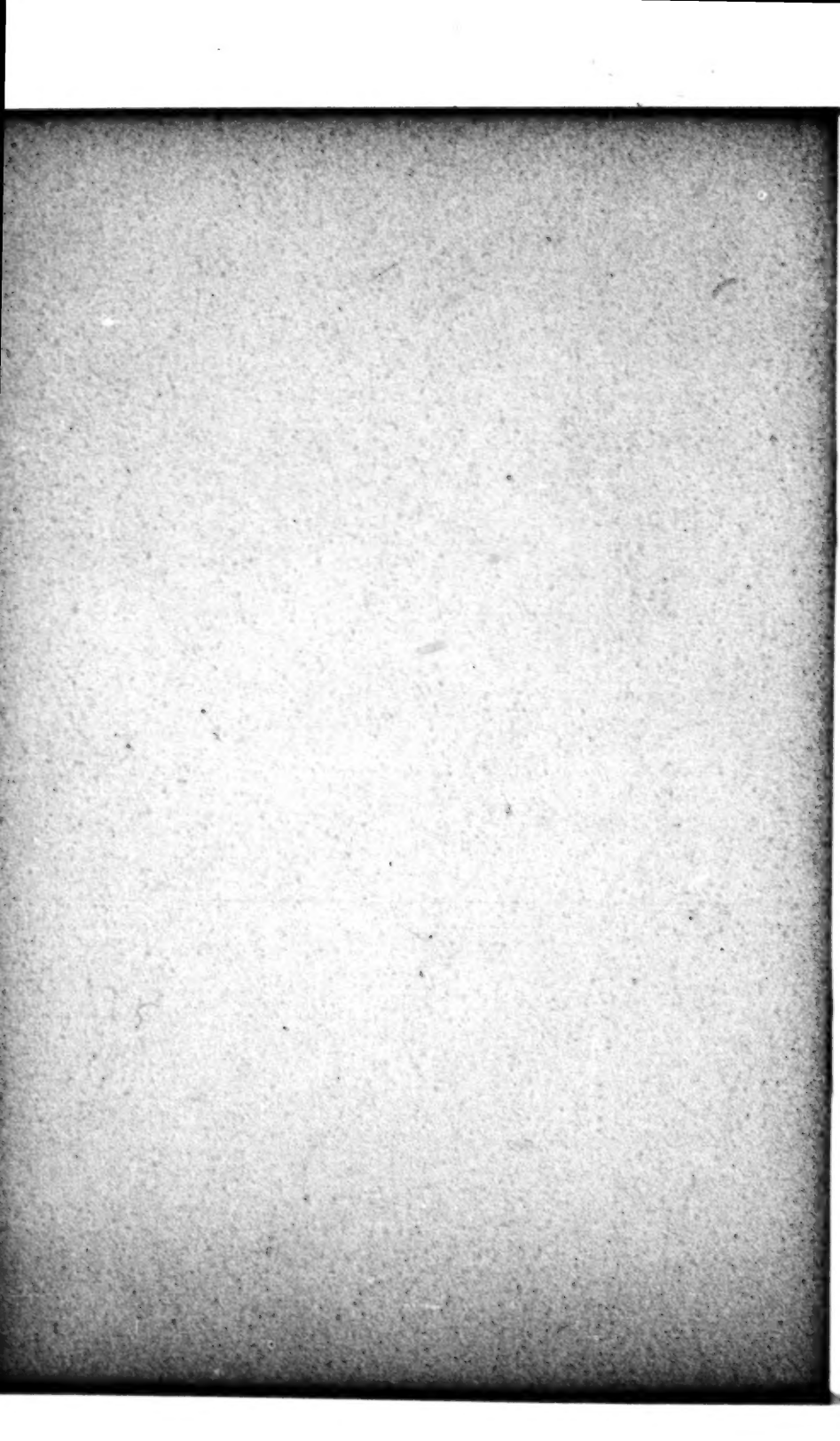
ANDREW KALMYKOW

New York, N. Y.

RICHARD E. GOODMAN

Chicago, Illinois

March, 1974





SUPREME COURT, U. S.

FILE

MAR 13

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1973

MICHAEL ROSEN, JR.

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No. 73-5412

---

JOHN R. DILLARD and WILLIE WILLIAMS, individu-  
ally, and on behalf of all other persons similarly situated,

*Appellants,*

v.

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS  
M. MILLER, Chairman, Industrial Commission of Vir-  
ginia, M. EDWARD EVANS, ROBERT P. JOYNER,  
Commissioners of the Industrial Commission of Virginia,  
and AETNA CASUALTY AND SURETY COMPANY,

*Appellees.*

---

APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE EASTERN DISTRICT OF VIRGINIA

---

REPLY BRIEF FOR THE APPELLANTS

---

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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No. 73-5412

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JOHN R. DILLARD and WILLIE WILLIAMS, individually, and on behalf of all other persons similarly situated,  
*Appellants,*

v.

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER, Chairman, Industrial Commission of Virginia, M. EDWARD EVANS, ROBERT P. JOYNER, Commissioners of the Industrial Commission of Virginia, and AETNA CASUALTY AND SURETY COMPANY,

*Appellees.*

---

APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE EASTERN DISTRICT OF VIRGINIA

---

REPLY BRIEF FOR THE APPELLANTS

---

ARGUMENT

I.

THE "DELICATE STRUCTURE" OF THE WORK-  
MEN'S COMPENSATION SYSTEM WILL NOT BE  
HARMED BY PROVIDING NOTICE AND THE  
OPPORTUNITY FOR A HEARING

The major part of the Argument in the Brief for the Appellees, Industrial Commission of Virginia and In-

dividual Commissioners, pp. 4-6, 10 (hereinafter referred to as Brief for Commission) is the contention that Virginia's workmen's compensation system would be rent out of shape by the relief asked for by the appellants. See also, Brief for Appellee Aetna Casualty and Surety Company (hereinafter referred to as Brief for Aetna) p. 21. This argument is constructed on two suppositions, that if the relief is granted it will open the floodgates for hearings and litigation (Brief for Commission, p. 5); and, that insurers and employers would retaliate by not voluntarily paying benefits to obviously eligible workers at the inception of the process. (Brief for Commission, p. 6)

The first supposition—opening the floodgates—has been raised in procedural due process cases and has been dealt with summarily. There is no reason to believe that a worker who is not still disabled will abuse the opportunity for a hearing any more than the welfare recipient. *Goldberg v. Kelly*, 397 U.S. 254. The Commission's statement that "it would be in the employee's financial interest to request a hearing even where he knew the employer was clearly right", (Brief for Commission, p. 5), is just not correct. The worker will always be financially better off returning to work, since compensation is only 66 2/3% of his average weekly wage up to a maximum of \$80.00 per week. The traditional reason for paying benefits at only a percentage of the worker's preinjury wage is to prevent the malingering and abuse about which the Appellees are so worried. A worker who has had his family income cut by 1/3 already has a great incentive to return to work. Volume I, *Supplemental Studies for The National Commission on State Workmen's Compensation Laws*, (hereinafter referred to as *Supplemental Studies*), Berkowitz, *Workmen's Compensation Income Benefits: Their Adequacy & Equity* (1973) p. 191. The maximum



benefit in Virginia in 1972 was only 78% of the 1971 poverty level, Volume I, *Supplemental Studies*, Berkowitz, *Workmen's Compensation Income Benefits: Their Adequacy & Equity* (1973) p. 204, and only 3% more than the maximum Aid to Families with Dependent Children welfare grant for a family of four. *Id.* at 206. One certainly must assume that the vast majority of workers who have in fact fully recovered from their injuries will continue to agree to voluntarily terminate their benefits and will go back to work.

An increase in hearing requests, if one materializes, would more likely be by those injured workers who are now being forced by financial pressures into a premature return to work, into lump-sum settlements of a less than a compensatory amount, or into just abandoning, out of lack of knowledge, the benefits due them.

It is odd that the Commission and Aetna have put forth the second supposition—that of employer and insurer retaliation—in that in other parts of their Briefs they point out that “there exist adequate sanctions to deter arbitrary action” (Brief for Aetna, p. 21, Brief for Commission, pp. 7, 8). It is clear that the Commission would have the power, and the duty, to correct any abuses of the system which would result from employer and insurer retaliation. See also, Section 65.1-115, Code of Virginia of 1950, as amended. (Giving the State Corporation Commission the power to revoke permits to do business in the state for violating any provisions of the Workmen's Compensation Act).

Appellants question whether this finely-tuned system which the Appellees are so concerned about having changed, is as equitable and just as they would have one believe. There are recent indications that the present system of Workmen's Compensation is not working the way it should. See generally, *The Report of the National*

*Commission on State Workmen's Compensation Laws* (1972), (hereinafter referred to as *National Commission Report*, and the National Workers' Compensation Standards Act of 1973 (S. 2008, 93rd Congress, 1st Session). To take just one example from the *National Commission Report* which indicates that there might be something amiss in Virginia's present workmen's compensation system, Table B.2, page 146, shows that in 1972 Virginia employers spent only .391% of their payrolls for workmen's compensation premiums. The only states in which employers paid less were Indiana, .385%, and Pennsylvania, .387%, and the average payment was almost twice as much as Virginia's (.722%).

## II.

### **APPELLANTS DILLARD'S AND WILLIAMS' NEEDS ARE REPRESENTATIVE OF THE CLASS WHICH THEY REPRESENT**

Aetna appears to concede that Dillard, Williams and their families were forced into great financial need by the suspension of their benefits, but alleges that this is not representative of the class (Brief for Aetna, p. 17).

In the most recent *Biennial Report of the Industrial Commission of Virginia* (1969-1970) the 16,348 workmen's compensation cases in 1970 were analyzed, showing the weekly wages of recipients. Table 5, page 12:

- Over 13% (2233) earned less than \$70 gross per week;
- Over 24% (3967) earned less than \$80 gross per week;
- Over 35% (5768) earned less than \$90 gross per week;
- Over 45% (7409) earned less than \$100 gross per week;

Over 54% (8896) earned less than \$110 gross per week;

Over 61% (9992) earned less than \$120 gross per week;

Over 68% (11,131) earned less than \$130 gross per week;

Aetna raises the executive and millionaire movie star (Brief for Aetna, pp. 17, 18) as examples of those who will receive workmen's compensation. The fact that they will receive compensation does not diminish the brutal need the vast majority of injured workers suffer, which need is shown by the above statistics. The fact that a millionaire movie star may occasionally become eligible for workmen's compensation should not affect this decision any more than this Court allowed its decision in *Goldberg v. Kelly*, 397 U.S. 254 to be affected by the fact that a small number of welfare recipients might own Cadillacs. See also Volume I, *Supplemental Studies, Price, Three Aspects of the Relationship of Workmen's Compensation to other Public Income Maintenance Programs*, 309, 340 (1973). The fact is that the financial situations of Dillard and Williams are typical of injured workers receiving workmen's compensation benefits throughout the country. *National Commission Report* (1972) p. 62.

### III.

#### THE CASES WHICH HAVE COME BEFORE THE COMMISSION SINCE THE AMENDMENT OF RULE 13 ARE NO DIFFERENT THAN THOSE PREVIOUSLY CITED IN APPELLANTS' BRIEF

The Brief for the Commission at page 7, footnote 7, implies that the cases which have come before the Commission since the amendment to Rule 13 are different than those discussed in Appellants' brief. The

fact is that the types of cases and issues are the same, E.g. *Ball v. Clinchfield Coal Co.*, \_\_\_\_ OIC \_\_\_\_, Claim number 226-684, October 24, 1973 (Conflicting medical opinion, benefits had been suspended for almost a year); *Royal v. Southern Industries, Inc.*, \_\_\_\_ OIC \_\_\_\_, Claim number 272-001, October, 1973 (Insufficient original medical evidence, back benefits to February 16, 1973); *Boyce v. Dodson Brothers Exterminating Co.*, \_\_\_\_ OIC \_\_\_\_, Claim number 257-731, October 17, 1973 (failure to lose weight does not constitute unjustified refusal of medical treatment, back benefits to March 24, 1973); *Thompson v. The United Dye Works*, 54 OIC 379, June 22, 1972 (Claimant's refusal of recommended surgery justified; already undergone three major surgical procedures without relief of back pain); *Moyer v. Virginia Oak Tannery, Inc.*, 54 OIC 286, September 7, 1972 (Claimant did not unjustifiably refuse offered employment). The "probable cause" determination of Amended Rule 13 has had no effect on the complex issues which have had to be reversed after an evidentiary hearing by the Commission, and after long periods during which the injured worker and his family have had to go without benefits.

There are no easy solutions to such intricate and controversial medico-legal questions, and their determination is ultimately a matter of statutory and case law interpretation, the development of facts and the application of law to facts.

Volume III, *Supplemental Studies*, Brooke, *Administration of Workmen's Compensation Cases in California, Florida, Massachusetts, New Jersey, New York and Wisconsin* (1973) p. 92.

## IV.

**THE ALLEGED SURVEY OF CASES SINCE JULY 1, 1972 IS NOT PROPERLY BEFORE THIS COURT, NOR, ASSUMING ITS VALIDITY, DOES IT INDICATE THAT NOTICE AND THE OPPORTUNITY FOR A HEARING ARE UNNECESSARY**

The Commission has introduced for the first time an alleged review of cases decided by the Commission since Rule 13 was amended (Brief for Commission, p. 7). Appellants' contend that such new evidence cannot be introduced at this point in the case. Appellants' have had no opportunity to test the accuracy of this "review", nor any opportunity to find out what factors were considered or not considered to determine that Rule 13 is "most effective".

Assuming, *arguendo*, that the bare statistics are correct, this does not show an effective system (Brief for Commission, p. 7). It does not, for example, factor in those injured workers who were forced to go back to work before the hearing. There are numerous opinions by the Commission which upheld the employer and insurer where the opinion merely states that the worker did not appear to defend his case. Without more than raw statistics there is no way to tell how many of the decisions used in the "review" were the result of the worker just giving up.

Probably an even larger number of workers were forced into lump-sum settlements prior to the hearing; presumably the Appellee's study shows all of their cases as having been upheld at the hearing.

A study for the National Commission on State Workmen's Compensation Laws graphically sets out the problem of forced settlements.

But the analysis so far implies that insurer pressure can pay off in terms of a reduced settlement and,

without denying this liability, the insurer can apply pressure to the worker. For instance, he may delay payments—in some cases until the settlement is reached. Even if payments are begun, they may be cut off or the worker may be told that they will be cut off. The evidence suggests that insurers are not willing to apply such pressures.

\* \* \* \* \*

Thirty percent of all the C & R [lump-sum settlements] cases reported that their payments had been cut off either because "the insurance company was trying to get them to go back to work" (10 percent) or for a variety of other reasons not specified (20 percent) but excluding final settlement, return to work, payments expired, denial of liability, or a violation by the worker. . . . Most C & R settlements ". . . were made after a period during which the worker had received no compensation and had paid for his own medical care, and hence urgently needed money to pay his debts."

\* \* \* \* \*

. . . [I]t is clear that some workers may have been forced to settle because no weekly compensation payments were made during the negotiation period.

Volume III, *Supplemental Studies*, Russell, *Compromise and Release Settlements* (1973) pp. 192, 193.

The Industrial Commission tries to negate appellants' argument concerning unfavorable lump-sum settlements by pointing to the fact that it must approve the settlement (Brief for the Commission, p. 7). But there is nothing in the record to show whether the Commission gives such "settlements" more than a perfunctory review, or whether in fact the Commission has ever disapproved of a settlement which has been "agreed to" by the employee and his employer or insurer.

Another factor ignored by the "review" is the procedure used by Travelers Insurance Company in Appellant Williams' case. They sent to the Commission their request for the probable cause determination and the hearing at the same time and by the same letter that they requested Mr. Williams sign a form acknowledging that he was no longer disabled (App. 75). If it had been true that Mr. Williams was fully recovered and ready to go back to work (rather than still partially disabled as was the case) and he had signed the acknowledgment, his case would have ended up as one of the statistics where the "probable cause determination" had been upheld, since Travelers had started the hearing procedure contemporaneously with their attempt to get a "voluntary" termination.

Despite the fact that these relevant factors were ignored by this "review", it still discloses that in nearly 10% of the remaining cases the probable cause finding was reversed at a later evidentiary hearing (Brief for Commission, p. 7 n. 8), and that at least one of these injured workers had to exist for almost one year without benefits. *Ball v. Clinchfield Coal Co.*, \_\_\_\_ OIC \_\_\_\_, Claim number 226-684 (From October 13, 1972 to October 24, 1973).

## V.

### ADEQUATE NOTICE IS NOT GIVEN INJURED WORKERS

In *Goldberg v. Kelly*, 397 U.S. 254, 267-268, the Court set out as one of the fundamental requisites of due process "that a recipient have timely and adequate notice detailing the reasons for a proposed termination". Aetna,

conceding as they must, that no notice is required by the statutes or the Commission, states that:

As a matter of practice, applicants [employer or insurers] notify the claimant simultaneously with the filing of the application.

(Brief for Aetna, p. 5). They cite the documents at pages 17 and 75 of the Appendix to support their statement. First it is evident that these notifications were not "timely" since the benefits had already been cut off by the time the injured worker received them.

Moreover, the forms used by the two insurance carriers in this case clearly do not adequately inform the injured worker. In *Goldberg v. Kelly*, 397 U.S. 254, 268-269, the Court stated:

The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.

For recipients of workmen's compensation the chances are almost even (49.1%) that they will have had less than four years of high school. Volume II, *Supplemental Studies*, Berkowitz, *Sources of Information About Workmen's Compensation Recipients* (1973) p. 127, Table C. The letter sent to Appellant Williams (App. 75) is, if anything, designed to confuse rather than to inform. The letter states that they are suspending benefits and requesting the Commission to hold a hearing "should one become necessary". It goes on to request Mr. Williams sign an attached form "acknowledging the termination of your temporary disability". It does not give the worker a copy of the evidence which is being submitted. It does not tell the worker that if he signs the attached form and he finds out later that he is in fact not fully recovered, he will then have the burden of proof shifted to him when he applies for a hearing.



Fundamental fairness dictates a more informative notice.

Where employees are concerned, even more affirmative action is necessary. Workmen's compensation is a rather complicated body of law and any omission or improper act on the part of the injured worker can result in a serious curtailment of his rights. Failure to consult his employer before obtaining medical case, failure to give proper notice or to file a claim, and lack of understanding of reopening and hearing requirements often result in unnecessary hardships. There is little in the law that is more disgraceful than an injured worker being denied benefits which are rightfully his but are barred due to his oversight or lack of understanding.

Volume III, *Supplemental Studies*, Lewis, *A Workmen's Restoration System* (1973) p. 509.

## VI.

### **AETNA IS NOT ACTING AS A PRIVATE PARTY WHEN IT SUSPENDS WORKMEN'S COMPENSATION BENEFITS**

The underlying fallacy of Aetna's state action argument is their starting from the proposition that an insurance carrier or employer, within the context of the Workmen's Compensation System, is acting as a private party just as they did under common law. As shown in the Brief for the Appellants, pp. 8-13, every act of the employer and insurer in relation to the Workmen's Compensation Scheme is controlled by the laws and regulations of the State. Aetna's statement that:

Unlike the state of California in *Reitman v. Mulky*, 387 U.S. 369 (1967), Virginia has not encouraged insurance carriers to suspend payments or given them greater rights to do so than they had at common law.

(Brief for Aetna, p. 14) (emphasis added) fails to mention the fact that *there was no Workmen's Compensation Scheme at common law*. Aetna's reliance on *Lindsey v. Normet*, 405 U.S. 56, which they state "more closely parallels the case with regard to the common law rights of the parties than any case cited by Appellant" (Brief of Aetna, p. 17), is for the same reason inapposite.

What Aetna seems to be arguing is that the Workmen's Compensation system is unconstitutional because it deprives employers and insurers of their freedom to act like private individuals in their relations with injured workers (Brief for Aetna, pp. 10, 11). This argument was of course answered long ago. See e.g. *Arizona Copper v. Hammer*, 250 U.S. 400. The state has imposed its Workmen's Compensation System on certain employers and all insurers can no more suspend workmen's compensation benefits without due process than they could suspend benefits for racially discriminatory reasons.

Even without Rule 13 the suspension of benefits would have been under color of state law. Aetna states that:

Prior to the adoption of Rule 13, therefore, the insurance carrier was not acting under color of state law in terminating benefits but rather was exercising its inherent right to control its own funds, subject to subsequent review.

(Brief for Aetna, p. 15). See also, Brief for Commission, p. 9. This statement fails to take into account that Aetna, by choosing to write workmen's compensation insurance, gave up its "inherent right to control its own funds" in respect to the laws and regulations governing workmen's compensation. Aetna must prove to the state that it is handling its funds properly to insure solvency. Section 65.1-116, Code of Virginia of 1950, as amended. Cf. Section 65.1-104, Code of Virginia of 1950, as amended

(dealing with self-insurers). Aetna must pay compensation in the amount and in the manner the law directs. (Brief for Appellant, pp. 11-12). If Aetna does not perform in accordance with the law the state will revoke its permit to do business. Section 65.1-115, Code of Virginia of 1950, as amended. The "inherent rights" of private parties to act like private parties are given up when they chose to participate with the state as a part of the Workmen's Compensation System. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 723-725.

Respectfully submitted,

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March, 1974



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IN THE

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OCTOBER TERM, 1973

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—v.—

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WARD EVANS, ROBERT P. JOYNER, Commissioners of the  
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

**APPELLANTS' REPLY BRIEF TO THE AMERICAN  
INSURANCE ASSOCIATION AND THE AMERICAN  
MUTUAL INSURANCE ALLIANCE AS  
*AMICUS CURIAE***

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March, 1974



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1973

**No. 73-5412**

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JOHN R. DILLARD and WILLIE WILLIAMS, individually, and  
on behalf of all other persons similarly situated,

*Appellants,*

—v.—

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER,  
Chairman, Industrial Commission of Virginia, M. ED-  
WARD EVANS, ROBERT P. JOYNER, Commissioners of the  
Industrial Commission of Virginia, and AETNA CASUALTY  
AND SURETY COMPANY,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

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**APPELLANTS' REPLY BRIEF TO THE AMERICAN  
INSURANCE ASSOCIATION AND THE AMERICAN  
MUTUAL INSURANCE ALLIANCE AS  
*AMICUS CURIAE***

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**ARGUMENT**

**I.**

**Appellants Are Seeking Notice and the Opportunity  
for a Prior Evidentiary Hearing**

The *Amici* for the insurance industry have set up a straw man and then proceed to demolish it. Throughout their brief they have framed their arguments against a position which appellants have not taken. They state that the appellants:

insist that nothing short of a full evidentiary hearing in every case prior to the suspension of benefits will satisfy the requirements of due process.

(Brief of The American Insurance Association and The American Mutual Insurance Alliance as *Amicus Curiae* p. 19) (hereinafter referred to as Brief for AIA; see also, Brief for AIA, pp. 3, 7, 27-28). The appellants have, of course, never taken such a position.

From the inception of this case the appellants have contended that due process requires only notice and the *opportunity* for a prior evidentiary hearing. (App. 55, 63, 72, 73; and Brief for Appellants 2, 7, 8, 25).

The *Amici* maintain that in Massachusetts the workmen's compensation system "requires a hearing in almost every instance prior to termination." (Brief for AIA, p. 7). Here again they are mistaken, since they state in their Brief (p. 8, n.2) that 95% of workmen's compensation claims nationwide are settled voluntarily, and then use a study in support of their statement about the Massachusetts system which says:

Compensation, once commenced, cannot be discontinued by the insurer *in the absence of the written assent of the employee*. (Emphasis added).

Brooke, *Administering Workmen's Compensation Cases in California, Florida, Massachusetts, New Jersey, New York and Wisconsin*, in Volume III, *Supplemental Studies for the National Commission on State Workmen's Compensation Laws*, p. 80 (1973). They also mistakenly state that in Massachusetts the opportunity for a hearing has "resulted" in a backlog of 8,000 to 9,000 cases. (Brief for AIA, p. 7). The 8,000 to 9,000 case backlog is made up of all cases before the Massachusetts Industrial Accident

Board including cases where there is a dispute over initial compensation and cases where the employee is requesting reinstatement. (*Id.* at 80-81). Therefore, the statement that the backlog is the "result" of the worker having the opportunity for a prior hearing is clearly not supported by the study.

## II.

### **The Alleged Guidelines for the Probable Cause Determination Do Not Provide Due Process**

The *Amici* have set out, on pages 13-16 of their Brief, a procedure which they say is used by the Commission in its probable cause determination under Rule 13. This procedure is completely unsupported by any documentation and is directly contrary to the facts in the record of this case, and the recent decisions of the Commission.

The *Amici* start out by saying that the Rule 13 procedure will not be instituted unless "the employee will not agree to a termination of benefits." (Brief for AIA, p. 13). This is in direct conflict with the facts of Appellant Williams' case where Travelers Insurance Company (the second largest workmen's compensation carrier in the country, Brief for AIA, p. 8, n.3) sent the request for a hearing to the Commission with a copy of the same letter being sent to Mr. Williams requesting his agreement to terminate the benefits. (App. 75). This large carrier starts the Rule 13 procedure simultaneously with its attempt to find out whether the worker will agree to termination.

Next they say the worker can file "a written statement or submit evidence." Again, in Mr. Williams' case he could not submit evidence since by the time he received his "notice" the probable cause determination had already taken

place. (App. 75). Assuming, *arguendo*, that it is the Commission's policy to allow the worker to submit evidence, they are obviously keeping it a secret. No one tells the injured worker. Even worse than not telling the worker, the Commission allows a carrier to send a notice to an injured worker which is deceptive. The notice to Mr. Williams implied that there would be no disadvantage to him in acknowledging that he is better and trying to go back to work since he can always request a hearing. (App. 75) (Reply Brief for Appellants, Argument V).

Throughout this hypothetical procedure the Commission is communicating with the carrier (Brief for AIA, p. 14), whether in writing or by phone we are not told, but the worker is never given a copy of any letters or a phone call to inform him of what is happening.

One then comes to what the *Amici* allege are the five "guidelines" used by the Commission for their probable cause determination. (Brief for AIA, pp. 15-16). One of the major deficiencies of each of the alleged "guidelines" is that there is no contact with the worker, although there is often contact with the insurer. (Brief for AIA, p. 14).

[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (Frankfurter, J., concurring). Take, for example, guideline 3 (Brief for AIA, p. 15) which deals with the situation where a worker, who the carrier admits is still at least partially disabled, has allegedly refused employment "suitable to his capacity." Section 65.1-63, Code of Virginia of 1950, as amended. The guideline requires that "the carrier must find the employee an appropriate job." (Brief for AIA, p. 15). If the carrier does not

include such a statement in its application, the Commission will inform the carrier of this deficiency (Brief for AIA, p. 14), and by return mail, one assumes, will come the carrier's statement about finding a job for the injured worker. The Commission informs the worker of none of this. The worker is unable to offer evidence to the effect that no job was offered; or that the employer the carrier said would hire him in fact would not; or that the job which was actually offered was not as stated by the carrier and was not within "his capacity." See, *e.g.*, *Haynie v. The Whiting-Turner Contracting Co.*, — OIC —, Claim Number 310-296 (September 13, 1973); *Boyce v. Dodson Brothers Exterminating Co.*, — OIC —, Claim Number 257-731 (October 17, 1973); and *Moyer v. Virginia Oak Tannery, Inc.*, 54 OIC 286 (1972). Surely the most fundamental notions of fairness would dictate that, when the Commission contacts the carrier with what is in effect a request for additional information, the Commission would also keep the injured worker apprised of what is happening to allow him to present his side.

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination . . .

Each of the other four alleged guidelines (Brief for AIA, pp. 15-16) as the discussion below will show, also fail to provide the injured worker with the fundamental fairness and integrity which the constitution mandates. *Richardson v. Perales*, 402 U.S. 389, 410.

Guideline 1. The probable cause determination is made on the basis of a doctor's report which indicates that the worker is able to go back to work, or will be able to do so in one week. (Brief for AIA, p. 15). The worker is not given notice and a reasonable opportunity to submit his own evidence. Contrary to what the *Amici* contend (Brief for AIA, pp. 17-18, 26-27), the record clearly shows (App. 14) that Mr. Dillard would still have had his benefits suspended under this "guideline" and, of course, Mr. Williams' case arose under this new system. The numerous cases which the Commission continues under this guideline to have to reverse on the grounds of conflicting medical evidence show that this is not an uncommon occurrence. See, e.g., *Jefferson v. Scott Pallets, Inc.*, — OIC —, Claim Number 279-184 (December 19, 1973); *Rasnake v. Clinchfield Coal Co.*, — OIC —, Claim Number 251-319 (November 27, 1973); *Crooke v. Vecco Concrete Construction, Inc.*, — OIC —, Claim Number 305-226 (November 26, 1973); *Ball v. Clinchfield Coal Co.*, — OIC —, Claim Number 226-684 (October 24, 1973); *Woodson v. Hark Manufacturing Co.*, — OIC —, Claim Number 233-401 (October 12, 1973); *Rector v. Martin & Gass, Inc.*, — OIC —, Claim Number 253-230 (October 26, 1973); *Fredricks v. S. Klein Department Stores, Inc.*, — OIC —, Claim Number 254-301 (October 29, 1973); *Ratcliff v. Estes Express Lines*, — OIC —, Claim Number 281-157 (August 21, 1973); and *Taylor v. A. H. Robins Co.*, — OIC —, Claim Number 213-692 (August 27, 1973).



Contrary to the assertion that an *ex parte* determination based on only one side's secret medical reports is "a practice specifically upheld by this Court in *Richardson v. Perales*" (Brief for AIA, p. 27), in that case the Court stated:

We are not concerned with termination of disability benefits once granted. Neither are we concerned with a change of status without notice. . . . The physicians' reports were on file available for inspection by the claimant and his counsel. And the authors of those reports were known and were subject to subpoena and to the very cross-examination that the claimant asserts he has not enjoyed.

*Richardson v. Perales*, 402 U.S. 389, 407.

Also, to allow a doctor to predict the course of recovery by saying the worker is disabled now but in a week he will be able to return to work, is giving to the medical profession a prescience which is not warranted. This is especially true where the worker is not allowed the opportunity to see the report and present evidence to the contrary.

Guideline 2. The probable cause determination is made on the basis of the employer's or carrier's statement that the employee has returned to work. (Brief for AIA, p. 15). This determination would not allow the worker to present evidence to the effect that the work he has been able to do brings him less than his preinjury wages and therefore he is eligible for partial disability, or that he in fact has not gone back to work.

Guideline 4. The probable cause determination is made on the basis of a doctor's statement that the worker has refused to cooperate. (Brief for AIA, pp. 15-16). The only example which is given in the guideline is that of the failure to keep appointments. Since the statute requires *unjustified*

refusal, Section 65.1-88, Code of Virginia of 1950, as amended, the worker, if given the opportunity, might be able to show a justifiable reason for missing the appointments. See, *e.g.*, *Diggins v. Grace & Co.*, 46 OIC 66 (1964) (failure of employer or carrier to provide transportation expenses); *McAdoo v. Meadowbrook Country Club*, 53 OIC 175 (1971) (claimant lived alone with no one to care for her so she went to mother's house out of state).

This "guideline" fails to give other examples of what carriers in cases before the Commission have maintained are unjustified refusals of medical treatment, such as Appellant Dillard's refusal to have another operation to remove his "right testicle and cord" (App. 15, 17), or Mr. Thompson's refusal to submit to back surgery after he had already undergone three major surgical procedures without relief of back pain. *Thompson v. The United Piece Dye Works*, 54 OIC 379 (1972). See also, *Terrell v. Lawrence Transfer & Storage Corp.*, — OIC —, Claim Number 155-702 (November 28, 1973); *Dial v. Auto Bumper Plating, Inc.*, — OIC —, Claim Number 261-089 (September 27, 1973); *Tharpe v. Virginia Baptist Home, Inc.*, 54 OIC 372 (1972).

There are unlimited variations on both the type of medical treatment recommended and a person's legitimate justification for not taking such treatment. This type of situation is perhaps the clearest example in workmen's compensation law of why the adjudicatory fact-finding function cannot proceed by a check-list approach like that set out in the guidelines. One is attempting to determine whether an individual is justified in not having something, possibly very drastic, done to him. There are just too many factors for the finder of fact to consider not to allow the worker the opportunity to present his side of the case.

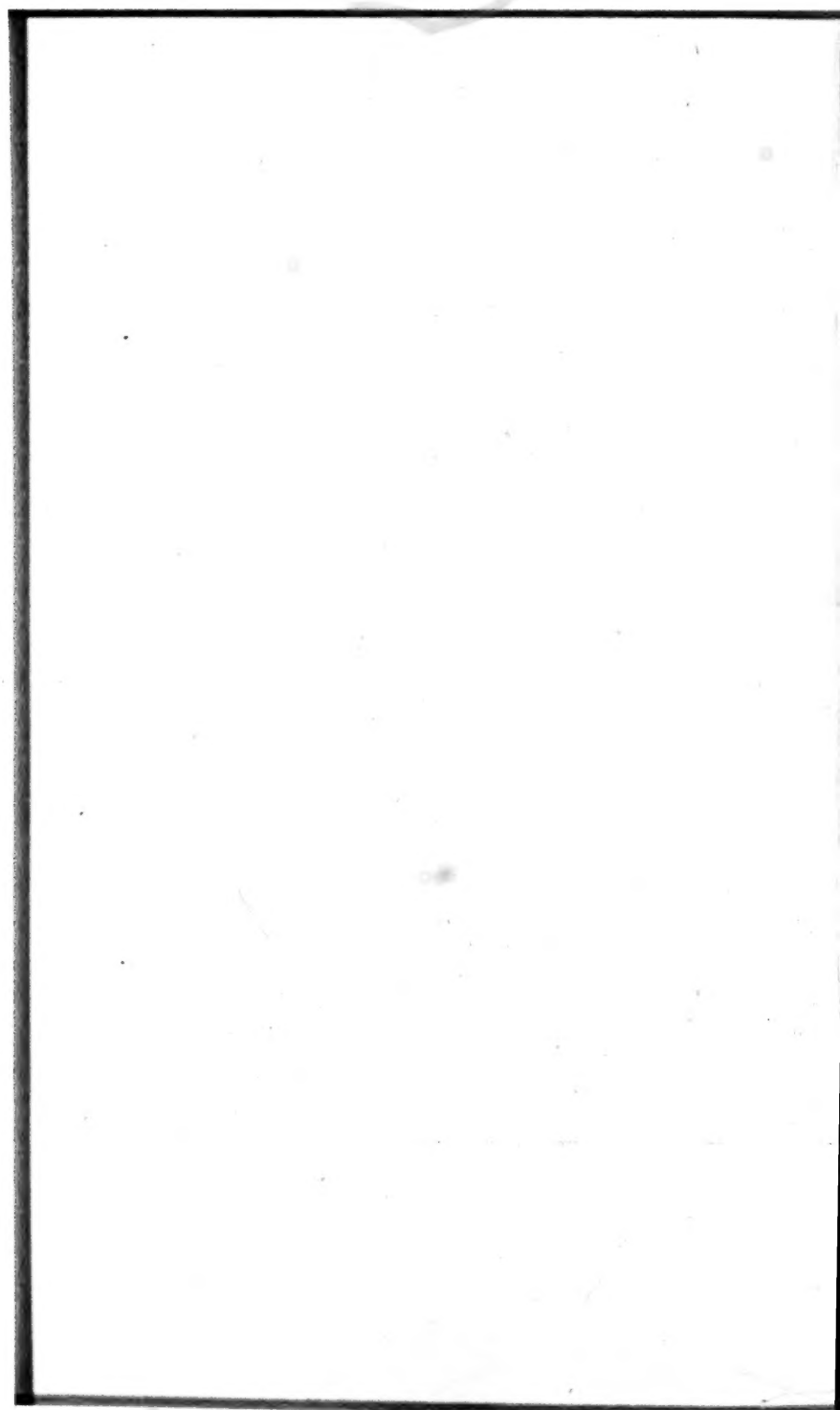
Guideline 5. The probable cause determination is made on the basis of the employer's or carrier's statement that the worker cannot be located. (Brief for AIA, p. 16). This type of situation is probably the only one where there is merely a simple yes or no answer. *Fuentes v. Shevin*, 407 U.S. 67, 100 (White, J., dissenting). But in such situations the only harm done by granting the relief appellants seek is the administrative and bookkeeping expense of having to put the benefit checks, which have been returned by the Post Office, back into the carrier's account. There will, however, be the benefit of uninterrupted compensation to the injured workers who the carrier mistakenly believes cannot be located. Such mistakes are inevitable in any high volume system such as workmen's compensation.

Finally, the "guidelines" do not in any way protect the injured worker from the harm done by being forced back to work too soon or into unfavorable lump-sum settlements. (Reply Brief for Appellants, Argument IV).

Respectfully submitted,

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*Counsel for Appellants*

March, 1974



Syllabus

DILLARD ET AL. v. INDUSTRIAL COMMISSION OF  
VIRGINIA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA

No. 73-5412. Argued March 26, 1974—Decided May 15, 1974

In this action (brought initially by appellant Dillard and in which appellant Williams was allowed to intervene) Williams claimed that the Due Process Clause of the Fourteenth Amendment prevented Virginia from permitting suspension of workmen's compensation benefits as a result of a claimed change in condition without notice to the claimant and a prior adversary hearing. The District Court rejected the constitutional claim on the merits. *Held*: If, as indicated in the briefs and oral arguments in this Court, state law permits a claimant whose benefits have been suspended to have them reinstated by the state trial courts, which act in a purely ministerial capacity, pending a full administrative hearing before the State Industrial Commission on the merits of his claim, it was probably unnecessary to address the federal constitutional question. Accordingly, the case must be remanded to the District Court for reconsideration. Pp. 784-798.

347 F. Supp. 71, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 799.

*John M. Levy* argued the cause for appellants. With him on the briefs was *George S. Newman*.

*Stuart H. Dunn*, Assistant Attorney General of Virginia, argued the cause for appellees Industrial Commission of Virginia and individual Commissioners. With him on the brief were *Andrew P. Miller*, Attorney General, and *William E. O'Neill, Jr.* *J. Robert Brame III* argued the cause for appellee Aetna Casualty & Surety

Co. With him on the brief were *William H. King* and *Willard I. Walker*.\*

MR. JUSTICE POWELL delivered the opinion of the Court.

Appellants seek to establish that, under the Due Process Clause of the Fourteenth Amendment, Virginia may not permit the suspension of workmen's compensation benefits without a prior adversary hearing. A three-judge United States District Court, over one dissent, rejected appellants' constitutional arguments. 347 F. Supp. 71 (ED Va. 1972). We noted probable jurisdiction. 414 U. S. 1110 (1973). Although the parties have focused primarily on the due process issue, the briefs and oral arguments have indicated that under state law a claimant whose workmen's compensation benefits have been suspended may have them reinstated by a state trial court pending a full administrative hearing on the merits of his claim. If this is an accurate reading of state law, it is in all probability unnecessary to address any questions of federal constitutional law in this case. Accordingly, the case must be remanded to the District Court for reconsideration.

# I

This litigation has centered on the role of the Industrial Commission of Virginia (Commission) in overseeing relationships between workmen's compensation claimants and employers or the employers' insurance companies.

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\*J. Albert Woll, Bernard Kleiman, Stephen P. Berzon, and Stefan M. Rosenzweig filed a brief for American Federation of Labor and Congress of Industrial Organizations et al. as *amici curiae* urging reversal.

James F. Fitzpatrick and David Bonderman filed a brief for the American Insurance Assn. et al. as *amici curiae* urging affirmance.

Although the Virginia system for workmen's compensation is controlled in all significant respects by an extensive statutory scheme referred to as the Act, Va. Code Ann. § 65.1-1 *et seq.* (1973 and Supp. 1973),<sup>1</sup> it operates in a largely voluntary manner through memoranda of agreement between disabled workmen and employers or insurance companies. Compensation is paid out of private funds, in some cases through self-insurance by employers but for the most part through coverage by private insurance companies. All agreements between employees and employers or insurance companies must be approved by the Commission, which may extend its imprimatur "only when the Commission, or any member thereof, is clearly of the opinion that the best interests of the employee or his dependents will be served thereby . . . ." § 65.1-93.

In most instances the parties agree voluntarily on entitlement to benefits.<sup>2</sup> When this does not occur, the Commission will grant a hearing to resolve the disagreement, § 65.1-94, and will make an award if found to be due. § 65.1-96. The Commission's awards are subject to review by appeal to the Virginia Supreme Court and, if unchallenged, are conclusive until changed by the

<sup>1</sup>The Act defines the relevant employment relationships, §§ 65.1-3 to 65.1-5, types of compensable disabilities, §§ 65.1-7 and 65.1-46, levels of compensation, §§ 65.1-54 to 65.1-57, 65.1-65 to 65.1-65.1, and 65.1-70 to 65.1-71, and the like. Participation in the Virginia system is mandatory for all employees and employers covered by the Act. § 65.1-23, as amended. The Act has been in force since 1918. Its history and general structure are described in the District Court's opinion. See 347 F. Supp. 71, 72-73 (ED Va. 1972).

<sup>2</sup>An *amicus* brief indicates that in the years 1967 to 1971 approximately 95% of all claims for workmen's compensation were resolved by voluntary agreement. Brief for American Insurance Association et al. 10.

Commission. § 65.1-98.<sup>3</sup> The Commission has no enforcement power *per se*. Rather, the Act provides:

"Any party in interest may file in the circuit or corporation court of the county or city in which the injury occurred, or if it be in the city of Richmond then in the circuit or law and equity court of such city, a certified copy of a memorandum of agreement approved by the Commission, or of an order or decision of the Commission, or of an award of the Commission unappealed from, or of an award of the Commission affirmed upon appeal, whereupon the court, or the judge thereof in vacation, shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though such judgment had been rendered in a suit duly heard and determined by the court. . . ." § 65.1-100.

The state courts have construed their enforcement duty under § 65.1-100 as purely ministerial. They do not inquire into whether a claimant's condition continues to justify compensation. Rather, they simply enforce agreements and awards that have been approved and not formally rescinded by the Commission.<sup>4</sup> Thus,

<sup>3</sup> The Virginia Supreme Court accords substantial weight to the Commission's findings of fact, *e. g.*, *LeWhite Constr. Co. v. Dunn*, 211 Va. 279, 176 S. E. 2d 809 (1970), and restricts its review primarily to questions of law. Cf. *Brown v. Fox*, 189 Va. 509, 54 S. E. 2d 109 (1949).

<sup>4</sup> See *Richmond Cedar Works v. Harper*, 129 Va. 481, 492-493, 106 S. E. 516, 520 (1921):

"Section 62 [the predecessor to § 65.1-100 of the Act] was clearly enacted for the purpose of providing a means not only of enforcing an award which had been affirmed on . . . appeal, but also all other final awards of the commission from which there had been no



a workmen's compensation claimant in Virginia has at his disposal a ready mechanism in the state trial courts to enforce any facially valid award or agreement. Since judicial enforcement is a ministerial act, this relief appears to be available with a minimum of delay or procedural difficulty.

Termination of benefits due to a change in a claimant's condition, like the commencement of benefits in the first instance, is a product of voluntary agreement in most cases. But when a dispute arises over a claimant's condition and his continued entitlement to benefits, the only avenue open to an employer for extinguishing a claimant's enforcement rights under § 65.1-100 of the Act appears in § 65.1-99. See *Bristol Door Co. v. Hinkle*, 157 Va. 474, 161 S. E. 902 (1932). This section provides, in relevant part:

"Upon its own motion or upon the application of any party in interest, on the ground of a change in

appeal, as well as all agreements between the parties approved by the commission. When this section is invoked, however, the rights of the claimants have already been established. The proceeding then resembles a motion under our statute for execution upon a forthcoming or delivery bond. . . . [A]ll of the rights of the parties having been previously litigated and determined, the court is required to render judgment in accordance either with (a) the agreement of the parties, which has been approved by the commission, (b) an award of the commission which has not been appealed from, or (c) an award of the commission which has been previously affirmed upon appeal. At this stage of the proceeding, the court is vested with no discretion; the statute is mandatory, and the refusal to render such judgment as that section requires could be compelled by mandamus. . . . The order of the court under section 62 in rendering judgment so that execution may be had, is the exercise of a ministerial function, and the mere method provided by the legislature for enforcing the collection by legal process of the amount already legally ascertained to be due . . . ."

Accord, *Parrigen v. Long*, 145 Va. 637, 134 S. E. 562 (1926).

condition, the Industrial Commission may review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded . . . . No such review shall affect such award as regards any moneys paid . . . .” Va. Code Ann. § 65.1-99 (1973).<sup>5</sup>

Although it may be indisputable that a claimant is no longer entitled to benefits due to a change in his condition, if the claimant refuses to terminate voluntarily an award or agreement, an employer or insurer appears to have no defense against a state court enforcement action until there is a formal determination by the Commission under this section. *E. g., Manchester Bd. & Paper Co. v. Parker*, 201 Va. 328, 111 S. E. 2d 453 (1959).<sup>6</sup> If an employer or insurance company meets the requirements established by the Commission for invoking its review under this section, the Commission in due course will

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<sup>5</sup> Although § 65.1-99 refers specifically to awards, it has been interpreted as applying also to voluntary agreements that have been approved by the Commission. See *Manchester Bd. & Paper Co. v. Parker*, 201 Va. 328, 111 S. E. 2d 453 (1959).

<sup>6</sup> In the *Manchester* case, a claimant and an insurance company entered into an agreement to pay benefits, which the Commission approved. The employee then returned to work, rendering himself technically ineligible for benefits. The insurance company suspended payments and commenced proceedings leading to a determination under what is now § 65.1-99 of the Act, but it failed to adhere precisely to the requirements of the Commission under that section. One year after the employee returned to work, the Commission refused to rescind the agreement, concluding that the insurance company had failed to comply with § 65.1-99 as implemented by the Commission. On appeal, the Virginia Supreme Court affirmed. It held that § 65.1-99 was the exclusive statutory means for rescinding an agreement approved by the Commission and that employers and insurance companies failed to follow that section at their own risk, without regard to the actual status of a claimant.

conduct a hearing, with notice and the right to participate extended to all parties.<sup>7</sup> At such a hearing, the employer or insurer bears the burden of proving a change in a claimant's condition that justifies rescission of an award or agreement. *E. g.*, *Virginia Oak Flooring Co. v. Chrisley*, 195 Va. 850, 80 S. E. 2d 537 (1954); *J. A. Foust Coal Co. v. Messer*, 195 Va. 762, 80 S. E. 2d 533 (1954).

The last sentence of the above quotation from § 65.1-99 prevents an employer or insurance company from recovering benefits erroneously paid prior to the Commission's formal termination of an award or agreement. See *Gray v. Underwood Bros.*, 164 Va. 344, 182 S. E. 547 (1935). Accordingly, an employer or insurer with cause to believe that a claimant is no longer entitled to benefits has an obvious incentive unilaterally to cease payment at the time it seeks a § 65.1-99 hearing before the Commission. If the Commission ultimately holds in its favor, the employer or insurer will not be required to pay any further benefits, and it will have protected itself against unmerited payments in the period prior to the Commission's full hearing. If the Commission rules against it, it will be required to reinstate benefits retroactively to the date of the application for a hearing, but at least it will have avoided paying benefits for which there was no true legal obligation.

In order to police this tendency of employers and insurers to terminate first and litigate later, the Commission promulgated its Rule 13. See *Manchester Bd. &*

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<sup>7</sup> There is no dispute in the instant case that the full hearing the Commission ultimately conducts before it formally terminates an award or agreement under § 65.1-99 of the Act satisfies the requirements of the Due Process Clause of the Fourteenth Amendment. Appellants' attack has been directed only at suspensions of benefits prior to the Commission's final hearing.

*Paper Co. v. Parker, supra.*<sup>8</sup> Rule 13 sets forth certain requirements that an employer or insurer must meet, with precision, see *ibid.*, before it can obtain the § 65.1-99 hearing which is a prerequisite to formal termination of an award or agreement on the ground of change in condition.<sup>9</sup> For example, the rule requires employers and

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<sup>8</sup> "The reason for the rule is stated in the opinion of the Commission as follows:

"More than thirty years ago when it was found by the Commission that some employers were arbitrarily disregarding the effect of outstanding awards and terminating payments directed by such awards, [Rule 13] . . . was promulgated . . . . The Rule has since been continuously in force." 201 Va., at 331, 111 S. E. 2d, at 456.

Rule 13 was promulgated pursuant to the general rulemaking authority vested in the Commission by the Act. Section 65.1-18 of the Act provides, in part: "The Commission may make rules, not inconsistent with this Act, for carrying out the provisions of this Act." The state courts have held that Rule 13 is a valid exercise of the Commission's rulemaking authority. See *Manchester Bd. & Paper Co. v. Parker, supra*.

<sup>9</sup> Commission Rule 13 provides:

"Applications for Review on Ground of Change in Condition.—Applications for review under § 65.1-99 of the Act must be in writing and state the ground relied upon for relief. Reviews of awards on the ground of a change in condition shall be determined as of the date of the filing of the application in the offices of the Commission, except as provided in paragraphs two and three hereof.

"All applications for hearing by an employer or insurer under § 65.1-99 shall show the date through which compensation benefits have been paid. No application shall be considered by the Commission until all compensation under the outstanding award has been paid to the date such application is filed with the Commission. Except, that in any case in which the employee has actually returned to work or has refused employment (§ 65.1-63), medical attention (§ 65.1-88), or medical examination (§ 65.1-91), compensation may be terminated as of the date the employee returned to work or refused employment, medical attention or medical examination, or as of a date fourteen days prior to the date the application is filed, whichever is later. In such cases the application will be considered and determined as of the date of return to work, or refusal, or as

insurers to continue benefits up to a defined date. And since April 1, 1972, the rule has imposed the following requirements on such applications:

"All applications by an employer or insurer shall be under oath and shall not be deemed filed and benefits shall not be suspended until the supporting evidence which constitutes a legal basis for changing the existing award shall have been reviewed by the Commission, or such of its employees as may be designated for that purpose, and a determination made that probable cause exists to believe that a change in condition has occurred."

Thus, under Rule 13, as amended, an employer or insurer must pay benefits up to a certain date, must make application under oath, and must submit "supporting evidence which constitutes a legal basis for changing the existing award . . . ." If these requirements are met and if the Commission finds that "probable cause exists to believe that a change in condition has occurred . . .," the employer or insurer will be accorded a hearing that may lead to rescission of the prior award or agreement. If the Rule 13 requirements are not met, the request for a hearing will be denied, and the award or agreement at

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of a date fourteen days prior to the date the application is filed, whichever is later. All applications by an employer or insurer shall be under oath and shall not be deemed filed and benefits shall not be suspended until the supporting evidence which constitutes a legal basis for changing the existing award shall have been reviewed by the Commission, or such of its employees as may be designated for that purpose, and a determination made that probable cause exists to believe that a change in condition has occurred.

"All applications for hearing by an employee on the ground of further work incapacity shall be considered and determined as of the date incapacity for work actually begins, or as of a date fourteen days prior to the date the application is filed, whichever is later."

issue will remain subject to enforcement in the state courts.

## II

Appellant Dillard was the original named plaintiff in this class action under 42 U. S. C. § 1983. He contended that the Due Process Clause of the Fourteenth Amendment prevented Virginia from permitting the suspension of workmen's compensation benefits without notice to the claimant and an adversary hearing at the time the Commission makes a probable cause determination pursuant to Rule 13. A three-judge United States District Court, over one dissent, rejected this argument on the merits. 347 F. Supp. 71 (ED Va. 1972). Dillard appealed, but then settled his claim, and we remanded the case for a determination of mootness. 409 U. S. 238 (1972). In an unreported order, the District Court subsequently permitted the intervention of appellant Williams and reinstated its published opinion. Williams then appealed, bringing up the due process arguments initially espoused by Dillard.

Appellant Williams was injured in the course of employment in April 1972. In May 1972, the Commission approved an agreement between Williams and his employer's insurance company, one of the appellees herein, for the payment of weekly compensation benefits. In October 1972, the insurance company applied under Rule 13 to the Commission for a hearing to determine whether Williams' disability had ended. Simultaneously, the insurer discontinued payments. Within a few days the Commission made an *ex parte* determination that probable cause existed to believe that a change in Williams' condition had occurred. At this point, Williams made no effort to petition a state court under § 65.1-100 of the Act to reinstate benefits pending the Commission's full hearing. In December 1972, the Commis-

sion conducted an adversary hearing, concluded that the insurance company had not met its burden of proof, and reinstated benefits. On April 17, 1973, the insurance company again petitioned the Commission, claiming a change in Williams' condition. The Commission once more found probable cause on an *ex parte* basis, and the company for the second time terminated benefits. Williams again did not resort to the state trial courts for an enforcement order. Approximately two months later, the District Court permitted Williams to intervene in this lawsuit and, as noted, reinstated its published opinion. Williams then brought this appeal.<sup>10</sup>

Williams' constitutional attack on the Virginia system for suspending workmen's compensation benefits is premised on the assumption that Rule 13, as amended, permits an employer or insurer to shield itself from a state court enforcement suit under § 65.1-100 of the Act in the interim between a probable cause determination

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<sup>10</sup> State proceedings relating to Williams' entitlement to benefits continued after he was permitted to intervene in this case. In September 1973, following an adversary hearing, the Commission formally terminated Williams' right to benefits. Williams appealed the Commission's ruling to the Virginia Supreme Court. On that appeal, he apparently sought review only of the accuracy of the Commission's determination that he was no longer disabled. In an unreported order issued in December 1973, the Virginia Supreme Court affirmed the Commission's ruling. Williams then filed a petition for certiorari in this Court seeking review of the state court holding. That petition, which is pending, No. 73-6431, *Williams v. Richmond Guano Co.*, does not raise the same constitutional arguments that Williams has advanced on this appeal. Indeed, although the same counsel represented Williams on certiorari and on the instant appeal, the petition makes no mention of this case. In light of our disposition of the instant case, we need not decide whether Williams might have addressed his present federal constitutional arguments to the Virginia Supreme Court on its review of the final order of the Commission.

by the Commission and the Commission's ultimate full hearing under § 65.1-99 of the Act. Williams in essence reads the phrase of Rule 13 providing that "benefits shall not be suspended" prior to meeting the requirements of the rule as meaning that benefits may successfully be suspended once those requirements have been met. If this reading of Rule 13 is incorrect, the complexion of this case changes dramatically, because it is then within the power of a claimant to reinstate benefits simply by petitioning a state trial court to perform a ministerial duty. It may well be that this perfunctory enforcement power is so readily available that a claimant could render any suspension of benefits *de minimis*. If so, those in appellants' class may not be able to establish a constitutionally significant injury under any reading of the Due Process Clause of the Fourteenth Amendment.

Every indication in the record and in the state authorities is that Williams had at his disposal a state court enforcement right that he simply failed to utilize. See n. 4, *supra*. As the Commission declared in its motion to dismiss before the District Court:

"Virginia's statutory framework does not authorize the *termination* of benefits as alleged by plaintiff, it permits only the initiation of a procedure by which benefits may ultimately be terminated. Should plaintiff be dissatisfied with the temporary cessation of benefits pending an administrative hearing, he is entitled by the provisions of § 65.1-100 to reduce his award to judgment in an appropriate court of record and compel the resumption of benefits. It should be noted that in such a case the court has no discretion and must enter judgment against the employer or his insurer." (Emphasis in original; citations omitted.)



One of the appellees makes the same point in its brief,<sup>11</sup> and Williams' counsel conceded at oral argument that, if read literally, § 65.1-100 of the Act permits no other result.<sup>12</sup> Counsel attempted to overcome this concession by arguing that the Virginia courts have not interpreted Rule 13 recently and that they might today hold that the rule overrides the language of § 65.1-100.<sup>13</sup> This argument plainly has no merit, since the Commission is without power to promulgate a rule that would repeal a section of the Act.<sup>14</sup> Moreover, it is obvious that the Commission had no such purpose. Rule 13 was designed to protect employees, see *Manchester Bd. & Paper Co. v. Parker*, 201 Va. 328, 111 S. E. 2d 453 (1959), not to deprive them of rights existing under the Act. It establishes barriers that an employer or insurer must surmount before it may obtain the § 65.1-99 hearing that is a prerequisite to extinguishing a claimant's right to enforce an award or agreement in state court. The rule is designed to serve as a screening device for eliminating obviously unmeritorious applications for hearings filed by insurers and employers.<sup>15</sup> It is not an authorization for an

<sup>11</sup> See Brief of Appellee Aetna Casualty and Surety Co. 5:

"Applicants usually cease paying compensation at the time they file the application based on a change of condition, but the actual award is changed only by order of the Commission following a full hearing or agreement of the parties. Although the award speaks in terms of continuing 'during incapacity,' incapacity can be challenged only before the Commission. Therefore, the employee can enforce payments even after the Commission finds 'probable cause' to believe a change has occurred and schedules a hearing just as he can enforce an award against a recalcitrant employer who suspends payments without probable cause."

<sup>12</sup> Tr. of Oral Arg. 53.

<sup>13</sup> *Id.*, at 52, 53, 55.

<sup>14</sup> See n. 8, *supra*.

<sup>15</sup> The Commission states that the purpose of Rule 13 is to require employers and insurers "to submit sufficient information to the

employer or insurer to suspend payments with assurance that a claimant may not have them reinstated under § 65.1-100 of the Act.

The District Court itself noted that Rule 13 probably does not permit an employer or insurer to escape § 65.1-100 of the Act.<sup>16</sup> It reached appellants' federal constitutional claim only by assuming, *arguendo*, "that the Rule is authority for the employer or insurer to terminate payments . . . ." 347 F. Supp., at 75. Based on what has been brought to our attention and our review of state law, such an assumption in all likelihood would be inaccurate.<sup>17</sup> In any event, that court must resolve any

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Commission of the ultimate merit of the suspension that the possibility of fraudulent, frivolous or arbitrary suspensions is eliminated [sic] and the likelihood of suspension in non-fraudulent but otherwise non-meritorious cases is minimized." Motion to Affirm 3. An *amicus* brief indicates that in about one-third of all Rule 13 applications the Commission finds no probable cause and thus does not permit employers or insurers to have a § 65.1-99 hearing. Brief for American Insurance Association et al. 14.

<sup>16</sup> The court declared:

"Nowhere in the Rule does it authorize or direct the employer or insurer to cease payments before a full hearing. It merely provides the Commission will not hear the petition of the employer or insurer asserting any change in condition if payments under the award have not been made up to the date the application is deemed filed, with an admonition that benefits *shall not* be suspended until the supporting evidence submitted with the petition has been reviewed and it is determined probable cause exists to believe a change has occurred, and if a finding of probable cause is made, the application will then be deemed filed. Here again, it does not authorize or direct suspension of payments, but merely provides the insurer or employer may not have a hearing on an alleged change of condition unless and until the provisions of the Rule are complied with." 347 F. Supp., at 74-75 (emphasis in original).

<sup>17</sup> There is also a question in the record whether a probable cause determination by the Commission under Rule 13 is necessarily *ex parte* and whether a claimant is in fact denied notice of such a

doubts on the issue before reaching appellants' federal claim. If there is significant doubt about the status of state law, the court should consider abstention, as the

proceeding. The District Court noted this at the outset of its opinion:

"The determination of 'probable cause' is to be made from an examination of 'supporting evidence which constitutes a legal basis' for changing the existing award. Nowhere does the Rule say the determination may be made without notice to the employee and a chance to be heard. The mere fact that such an inference may exist—a determination without notice to the employee and an opportunity to be heard—does not render the language objectionable on its face. . . . The [April 1, 1972] amendment to the Rule is new and the evidence does not indicate what the Commission will require in the way of supporting evidence to constitute a legal basis for establishing probable cause to believe a change in condition has occurred." 347 F. Supp., at 75 (citation omitted).

Moreover, we were informed at oral argument that as a matter of practice insurance companies and the Commission regularly inform claimants that a probable cause determination is pending. Tr. of Oral Arg. 43-44. It was also asserted that the Commission would take into account submissions by a claimant when it makes a probable cause determination. *Id.*, at 44. An *amicus* brief indicates that:

"An employee may, under the present Rule 13, file a written statement or submit evidence opposing the probable cause determination. However, in fact this rarely occurs because the employee normally does not have access to the employer's evidence and because the Commission acts rapidly without waiting to receive any submission from the employee. (However, if an employee does send in information even after probable cause is found, the Commission will evaluate the information. If the information indicates that payment should not be suspended, the Commission informs the carrier and the carrier then continues payments to the claimant)." Brief for American Insurance Association et al. 13-14.

If a claimant receives notice of a Rule 13 application and if the Commission will receive and evaluate his counter-affidavits or medical evidence, the constitutional challenge to the Virginia system would arise in a different light even if no recourse to the state courts were available under § 65.1-100 of the Act. As it did with regard

state law question may well be dispositive. *E. g.*, *Lake Carriers' Assn. v. MacMullan*, 406 U. S. 498 (1972). If, as appears to be the case, state law clearly provided Williams an adequate state court remedy he did not pursue, then the court will be presented with a wholly different issue from the one it decided. Assuming it is also established that the Commission's Rule 13 procedures are necessarily *ex parte*,<sup>18</sup> then the only question is whether the interruption, if any, of benefits between the time of suspension and the time a claimant obtains reinstatement of benefits by petitioning the state courts is of any controlling significance. If the court determines that a claimant as a general rule may obtain reinstatement of benefits without undue delay following a finding of probable cause by the Commission under Rule 13, then the court should dismiss the complaint.

We indicate no view on the question decided by the District Court—whether the suspension of benefits without notice and an adversary hearing denies due process of law, where the funds at issue are private, not public, where the State requires a finding of probable cause and other procedural safeguards short of a prior adversary hearing, and where a full hearing follows suspension of benefits by a period on the average of one month. The judgment is vacated, and the case is remanded for reconsideration in accordance with this opinion.

*It is so ordered.*

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to the question of the impact of Rule 13 on a claimant's right to reinstate benefits by resort to the state trial courts, the District Court bypassed this question of state law. It "assum[ed] that the Rule does not provide for notice and a hearing to the employee prior to termination of the award . . . ." 347 F. Supp., at 75. The court should have resolved its doubts on this issue before addressing appellants' federal constitutional argument.

<sup>18</sup> See n. 17, *supra*.

MR. JUSTICE DOUGLAS, dissenting.

This case involves a class action brought on behalf of all persons who, as a result of sustaining employment-related injuries, are recipients of benefits under the Virginia Workmen's Compensation Act, Va. Code Ann. § 65.1-1 *et seq.* The action challenges the constitutionality under the Due Process Clause of the Fourteenth Amendment of that part of the Act allowing a termination of benefit payments by the employer or insurer as a result of an asserted change in condition prior to a full hearing on the alleged change before the Commission. The complaint prayed for an injunction to restrain enforcement of that part of the Act. A three-judge District Court was convened, 28 U. S. C. § 2281, and the challenged portions of the Act were found constitutional, one judge dissenting. 347 F. Supp. 71 (ED Va. 1972).

The Act provides a system allowing the employer and the employee to escape personal injury litigation for on-the-job injuries; it provides for the payment of compensation under fixed rules. Once the Industrial Commission approves an award of benefits, the Commission or any party in interest may move for review of the award "on the ground of a change in condition." Va. Code Ann. § 65.1-99. According to the Commission's Rule 13, all such applications by an employer or insurer to decrease or terminate benefits "require that an *ex parte* inquiry be held by the Commission to determine whether probable cause exists for a change in the award before any benefits may be temporarily suspended pending a full hearing." 347 F. Supp., at 79.

Suspension of benefits awarded by the Commission is thus permitted upon an *ex parte* determination that "probable cause" for termination exists. The parties here do not dispute that the full hearing conducted by the Commission before final termination, with notice

and opportunity for all parties to be heard, satisfies the requirements of due process. At issue is the *ex parte* suspension of benefits of a Commission's award prior to that final hearing. The Court does not reach the constitutionality of the suspension, because a claimant, whose benefits have been so suspended, may bring suit in a state court to have them reinstated, pursuant to Va. Code Ann. § 65.1-100.

I disagree that the opportunity for a claimant to counteract a termination of benefits payable under an award of the Commission by instituting a state court action is an answer to the constitutional challenge to the termination.\* The issue here is the necessity of a hearing *before* termination of benefits. Any state remedy which places upon the worker the burden of going to court to redress a termination which has already occurred is simply not in point. It places the burden of affirmative action upon that segment of society least able to bear it at a time which could not be less opportune. As Judge Merhige said below in dissent: "Judges need not blind themselves to what they know as men. I cannot help but believe that the average working man in Virginia, who has sustained an injury resulting in a substantial reduction of his weekly income, suffers a grave and immediate loss. . . . The very thought that the *ex parte* proceeding permitted by Rule 13 may result in a cessation of milk delivery, or electric power, or fuel to a working man and his family, shocks my conscience." 347 F. Supp., at 81.

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\* In *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969), wages earned could not be seized under garnishment by a creditor without prior notice and opportunity to be heard. By the same token, in the present case entitlement to an award made by the Commission should not be taken *ex parte* but only after prior notice and opportunity to be heard if procedural due process is to control as it must by reason of the Fourteenth Amendment.

The opportunity for working-class men and women in that grave situation to enter state court and do battle with the corporate employers and insurers who have already terminated their benefits without a hearing is no meaningful solution to their problem.

Since I find the state remedy inapposite, I dissent from the remand to consider its impact.